Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973

No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

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CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Central District of California entered on June 4, 1974, by the Honorables Walter Ely, Circuit Judge; William G. East and Warren J. Ferguson, District Judges, declaring the California Obscenity Statutes (California Penal Code section 311 *et seq.*) to be unconstitutional and ordering Appellants to return to Appellees all materials which had been seized from Appellees' agents as evidence in prosecutions under the state obscenity statutes. Appellants submit this statement to show that the Supreme Court of

the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below.

The following unreported orders and opinions are set forth in the Appendix: (A) opinion of the Federal District Court and judgment, (B) order denying the temporary restraining order and determining that certification for the impaneling of a three-judge court was warranted, (C) order to show cause *in re* contempt, (D) decision of the Appellate Department of the Orange County Superior Court.

Jurisdiction.

Appellants have been informed by the Clerk of the Federal Court that the record on appeal in this matter consists of the procedural history of several cases and shows that as each new complaint was filed that case was automatically tacked on to the ones already pending before the three-judge court. On December 5, 1973, at least *nine* cases were joined together by the three-judge court who on that date heard extensive argument on the issue of the constitutionality of the California obscenity laws. The same record shows that in many of those cases preliminary injunctions and temporary restraining orders had issued and were kept in force until the decision in *Miranda v. Hicks* was entered. All of the cases, as the record on appeal shows, have been declared to be controlled by *Miranda v. Hicks.*

Appellants herein, however, do not base the jurisdiction of this Honorable Court on the happenings and events in those cases except to the extent that those cases show the *injunctive* quality of the judgment which the court alleges to be "declaratory in nature."

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1253 in that this is a case within the purview of that statute for the following reasons:

On November 29, 1973, Appellee Vincent Miranda, doing business as Walnut Properties and Pussycat Theatre Hollywood, a California corporation, filed a "Complaint for Damages, Declaratory Relief and Injunction" pursuant to 28 U.S.C. 1343(3) and (4), 42 U.S.C. 1983, 28 U.S.C. 2201 and 2202, and 28 U.S.C. 2281 and 2284. Appellants were notified of the pending action although they were not served with the summons and complaint until January 14, 1974.

On December 28, 1973, the Honorable Lawrence T. Lydick, District Judge, to whom the case was originally assigned, issued an order denying Appellee's request for a temporary restraining order and for return of the films seized but concluded that:

> The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question. notification and certification in accordance with 28 U.S.C. sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

The three-judge court which was convened pursuant to the above certification by its opinion and judgment entered on June 4, 1974 (see Appendix A), held the California Obscenity Statutes to be unconstitutional and although it specifically did not enjoin pending state prosecution, it ordered the return of all evidence seized, further declaring that:

> The court retains full and complete jurisdiction over the parties and the causes of action for all purposes. (See Appendix A, p. 18.)

On August 3, 1974, Judge Ferguson, a member of the three-judge panel, issued a temporary restraining order against further seizures pursuant to the above-retained jurisdiction and ordered Appellants to show cause why they should not be found in contempt for not having returned the seized copies. He further ordered them to show cause why further seizures and prosecutions should not be enjoined both as to "Deep Throat" and as to a new movie, "Devil in Miss Jones," and why all copies seized pursuant to search warrants issued after adversary hearing, on July 29, 30 and 31, 1974, should not be ordered returned. On August 12, 1974, an injunction against further seizures was issued. These orders show that although the Court did not "enjoin" operation of the state laws on paper, it acts in an injunctive manner in enforcing its "declaration."

Notice of Appeal was filed in that court on July 5, 1974. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, section 1253. The recent decision of *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701 (1971), further upholds the jurisdiction of the court to

review the judgment in this case on direct appeal. There, as in the case at hand, properties had been seized in connection with state obscenity prosecutions. There as here:

> Since the appellees sought a judgment declaring a state statute of statewide application unconstitutional, together with an injunction against pending or future prosecutions under the statute, a three-judge court was convened. That court held the Louisiana statute constitutional on its face. . . . Although the three-judge court declined to issue an injunction against the pending or any future prosecutions, it did enter a suppression order and require the return of all the seized material to the appellees. 304 F.Supp. 662, 667-670 (1969). the local district attorney and other law enforcement officers appealed. . . .

In ruling that the jurisdiction of the United States Supreme Court was properly invoked, the opinion, at note one, concludes:

> Under 28 U.S.C. §1253 an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." The orders directing the suppression of evidence and the return of the seized material were injunctive orders against the appellants. Thus, we have jurisdiction to review those orders.

Since in the case under review the injunctive orders were justified by the district court solely on the basis that the property ordered returned or to be ordered returned was no longer contraband or evidence of il-

legal activity because of the Federal District Court's declaration that the California statutes are invalid (Appendix A, p. 18) and since the Court considers its declaration of unconstitutionality so binding as to preclude enforcement under penalty of contempt, under the rationale of *Perez v. Ledesma, supra,* both the constitutionality of the California obscenity statutes and the injunctive orders to return are properly reviewable. Also supportive of this Court's jurisdiction to determine both issues is *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 160 (1973).

Additionally, 28 U.S.C. section 2281 specifies that a three-judge court must be convened in an action to secure an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes upon the ground of the unconstitutionality of such statute.

The following cases sustain the jurisdiction of the Supreme Court to review the injunctive orders and the underlying finding of unconstitutionality by stating that if the three-judge court (and, on appeal, the Supreme Court) has jurisdiction by reason of the presence of a substantial constitutional question, its jurisdiction extends to every question of law involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case: *Sterling v. Constantin,* 287 U.S. 378, 393-394 (1932); and cases cited; *California Water Service Co. v. Redding,* 304 U.S. 252, 255-256 (1938); *Public Service Commission v. Brashear Lines,* 312 U.S. 621, 625 (1941); *Zemel v. Rusk,* 381 U.S. 1, 5-6 (1965); *United States v. Georgia*

Public Service Commission, 371 U.S. 285, 287-288 (1963); *Paul v. United States,* 371 U.S. 245, 250 (1963).

Finally, in the case at hand, lack of the lower Federal court's jurisdiction is evident. Where there is a complete lack of jurisdiction in the district court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the decree of a three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont & Northern R. Co. v. United States,* 280 U.S. 469. This power of the Court exists regardless of whether the three-judge court has entered a judgment for the plaintiff or the defendant. As long as a decree was entered on the merits, the Court has jurisdiction to reverse it and to order a dismissal for want of jurisdiction. See *Smallwood v. Gallardo,* 275 U.S. 56, 62; *Piedmont & Northern R. Co. v. United States, supra,* at 478. Conversely, where the plaintiff is clearly entitled to relief, as where the state statute he is attacking is plainly unconstitutional, the Supreme Court may direct the district court to enter an appropriate decree on the merits, even though that court had originally been improperly constituted with three judges. *Bailey v. Patterson,* 369 U.S. 31.

Questions Presented.

1. Whether the *Miller v. California* decision issued by this Honorable Court on July 25, 1974, dismissing "for want of a substantial federal question" an appeal from a post-*Miller* conviction under the California Obscenity Statutes is a decision on the merits as to the constitutionality of the California Obscenity Statutes which is binding on lower Federal courts.

2. Whether the Federal District Court erred when it refused to abstain from adjudicating constitutional validity of the California Obscenity Statutes where state prosecutions were pending against representative agents of the Appellees.

3. Whether the federal district court erred when it refused to abstain from adjudicating constitutional validity of the California Obscenity Statutes where state criminal prosecutions against Appellees had been filed eight days after the three-judge court had been constituted and were pending at the time the court issued its declaratory judgment.

4. Whether the doctrine of equitable abstention is applicable where federal action would have a disruptive effect upon a state's criminal processes and has the effect of encouraging disobedience of validly issued orders of a state court and the further effect of encouraging defendants in state proceedings to refuse to litigate in state courts.

5. Whether the Federal court can properly order Appellants to return items seized under order of validly issued search warrants and which are entered as evidence in cases presently pending in the state courts and which are under the physical *or* constructive custody of the state court.

6. Whether the three-judge court abused its power in making a finding that Appellants had harassed the Appellees without allowing for an evidentiary hearing, ordering the matters submitted on affidavits and determining the factual issue in a manner contrary to the determination of the one judge who under the statute should have been a member of the panel.

10. Whether the court erred in determining that searches conducted under authority of duly issued search warrants constituted harassment as a matter of law.

11. Whether failure to follow the procedures mandated by 28 U.S.C. 2284 vitiates and voids the injunctive orders of the court.

Statutes Involved.

California Penal Code sections 311, 311.2, ***et seq.*** and California Penal Code sections 1526, 1536, 1539, and 1540 are set forth in Appendix E.

Statement of the Case.

Appellee is the owner of a theater located at 6177 Beach Boulevard, Buena Park, Orange County, California. The theater is called the Pussycat Theatre and exhibits motion picture films to adults only. Said theater was open and operating from November 23, 1973, to November 29, 1973.

Appellant Cecil Hicks is and was at all pertinent times the District Attorney of Orange County. Appellant Oretta Sears is and was at all pertinent times a Deputy District Attorney of Orange County. Both Hicks and Sears were charged with the duty of enforcing the provisions of the California Penal Code in Orange County, California.

On November 23, 1973, the Honorable John H. Smith, Jr., Judge of the Municipal Court, Central Orange County Judicial District, along with several officers from the Buena Park Police Department, viewed a film entitled "Deep Throat" at the Pussycat Theatre owned by Appellees in Buena Park, California. Based

on his viewing of the film, Judge Smith felt there was probable cause for believing the film to be obscene and issued a search warrant for the seizure of the film.

That same day, November 23, 1973, at about 4:30 p.m., Buena Park police officers made a seizure of another copy of "Deep Throat" which was being shown at Appellees' theater. The seizure was made pursuant to a second search warrant signed by Judge Smith. The affidavit of said warrant stated that the second copy of the film in fact differed from that seen by Judge Smith as there were additional scenes of sexual activities not present in the first film.

Later that day a third seizure of a copy of the film "Deep Throat" was made, based on a third search warrant signed by Judge Smith, who had personally returned to the theater again to view the film. During this viewing, Buena Park Police Officer Fontecchio sat with the judge and pointed out differences between the copy being viewed and the previously seized copies. Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further ordered the officers to seize all monies present in the theater, including money in the theater safe. Pursuant to the judge's order, the officers called in a licensed locksmith who opened the floor safe of the theater, from which some $4,000 was seized.

On Saturday, November 24, 1973, the Buena Park police officers deposited with Judge Smith all items which had been seized pursuant to the three warrants. Also on that date they observed a fourth copy of the film "Deep Throat" which was being shown at Appellees' theater. The officers saw the film and noted that this fourth film was different from the seized

copies. They reported the differences to Judge Smith who issued a search warrant and a fourth seizure of the film took place.

On Monday, November 26, 1973, in the Orange County Superior Court, the People of the State of California applied for and were granted a temporary restraining order and order to show cause in respect to a determination of obscenity of the movie "Deep Throat". In its order to show cause, the Superior Court of Orange County ordered Appellees to appear and show cause five days later why all copies of the film "Deep Throat" in their possession in Orange County should not be ordered seized as being obscene. The order further provided that the hearing on the issue of obscenity could be had at the request of Appellees at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice. At Appellees' request, at 2:30 p.m. on that same day a hearing was had in Department 21 of the Orange County Superior Court, the Honorable Byron K. McMillan, Judge Presiding, the judge who had issued the order to show cause and temporary restraining order.

Attorney David M. Brown appeared at said hearing on behalf of Appellees. He argued lack of jurisdiction of the Orange County Superior Court to hold such a hearing. He filed with the Orange County Superior Court a short document entitled "Reservation of Federal Constitutional Question" in which he stated, "Defendants . . . reserve all federal constitutional claims for purposes of federal jurisdiction." Judge McMillan of the Orange County Superior Court ruled that jurisdiction was present, at which time Mr. Brown refused to submit to the jurisdiction of the state court. The

matter was recessed until the following morning at 9:00 a.m. for the taking of evidence and Mr. Brown was advised that if Appellees made no appearance, the hearing would be held in their absence.

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence the court ruled that the film "Deep Throat" was obscene beyond any reasonable doubt and issued an "order of seizure after adversary hearing" directing officers to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theatre or which were to be found there in the future, and to bring same before the court. This order was served upon the theater that very day, though no seizure was made as no copies of the film were present.

Also on *November 26, 1973,* criminal complaints were filed against the agents of Appellees who were managing the theater and showing the films. Those prosecutions are still presently pending and have been continued at Appellees' request to allow a final determination of these proceedings.

On *November 29, 1973,* Appellees filed the complaint for damages, declaratory relief and injunction. The case was assigned to Judge Warren Ferguson who disqualified himself. (See Appendix F.)

On December 28, 1974, an order denying a temporary restraining order was issued by Judge Lydick of the Federal District Court. The order reflects Judge

Lydick's finding that the record was totally devoid of any showing of wrongdoing by Appellants:

> The record before us shows that on November 23 and 24, 1973, law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.
>
> Thereafter on November 26, 1973, defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973, at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff's corporation's theatre seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.
>
> In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a

temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required. (Appendix B.)

On January 8, 1974, an order designating the Honorables Ely, Ferguson and East as the three-judge court to hear the case was entered by Judge Chambers, Chief Judge for the Ninth Circuit. (The order was forwarded to Appellants on February 8, 1974.)

On January 8, 1974, Mr. Bayley, the manager of Appellee's theater, filed a motion to suppress as illegally seized the four copies of "Deep Throat." On January 15, 1974, Appellees' involvement having come to light, the state criminal complaint was amended to include Appellees.

On January 29, 1974, Appellants filed their answer supported by certified documents and notarized declarations signed under penalty of perjury (essentially the same documents and affidavits presented to Judge Lydick in opposition to the temporary restraining order).

On January 29, 1974, the Orange County Municipal Court granted Appellees' motion to suppress as to two of the copies of "Deep Throat." It denied the motion as to the other two copies.

On February 7, 1974, Appellees filed motion to dismiss claim of damages without prejudice and submitted an affidavit in support thereto. At that same time Appellants moved for summary judgment.

On February 15, 1974, Appellants filed notice of appeal from the Orange County Municipal Court's order of suppression.

On March 4, 1974, the Honorable Judge Ferguson granted Appellees' motion to dismiss and denied Appellants' motions as "moot."

On March 20, 1974, a memorandum was issued by Judge Ferguson on behalf of the three-judge court ordering the issue of "harassment" submitted on affidavits and requesting additional points and authorities on the issue of constitutionality of the state statutes. Neither Appellees nor Appellants submitted additional affidavits so that the three-judge court had before it only the original affidavits presented to Judge Lydick.

On June 4, 1974, the three-judge court issued its memorandum opinion totally ignoring Judge Lydick's findings, totally ignoring the existence of the adversary hearing in the state court, totally ignoring the criminal proceedings pending in the state court, totally ignoring the fact that one of Appellants, Deputy District Attorney Sears, was improperly named since her sole involvement was the preparation of the state court order to show cause regarding the adversary hearing and concluding that (a) California Penal Code sections 311, *et seq.*, are unconstitutional, (b) that *People v. Enskat*, 33 Cal.App.3d 900, improperly construes the California statute and improperly interprets prior California decisions by the use of "specious arguments," (c) that the "*objective*" facts set forth in the first part of the

opinion clearly demonstrate "bad faith and harassment" and (d) that requiring the state to return *all* copies of the film "might have" some disruptive influence on a possible future prosecution—*or upon prosecutions of others*—but (e) since the state statute has been declared unconstitutional the property is no longer evidence and/or contraband and "it can and is ordered returned." (Appendix A.)

A notice that a motion for relief from judgment to amend and alter judgment and to correct errors in the judgment pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (d), 60(a) and (b), and 62 would be made on July 1 was filed by Appellants Gourley, Fontecchio, Hafdahl and Harrison on July 14, 1974. Petitions for Rehearing under Rule 60(b) of the Federal Rules of Civil Procedure were filed by the other Appellants. A motion to stay the proceedings was also filed.

Appellants Hicks and Sears felt the wisest course was to follow the advice given by this Court in *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209 (1974), and even though on June 4, 1974, at a time when the Declaratory Judgment was not yet final, the Pussycat Theatre resumed showing of the film "Deep Throat," no search warrants for its seizure were requested.

On July 25, 1974, this Honorable Court issued its opinion in *Miller v. California,* dismissing the appeal for want of a substantial federal question. All decisional laws and logic indicate that opinion to be a declaration that the California Law *is constitutional.*

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of all the seizures and acknowledged that a valid adversary hearing on the issue of obscenity had been had. (Appendix D.)

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Orange County Superior Court that "Deep Throat" was still being shown and asked whether the court wished to issue a warrant for its seizure. An adversary hearing having been had on November 26 and 27, 1973, the court issued the search warrant and several seizures occurred between Monday, July 29 and Friday, August 2, 1974, each on a separate warrant and each being the source of a new prosecution against the theater, the employees, etc.

In addition, on July 30, 1974, the state judge, upon affidavit of a police officer, issued a search warrant for the seizure of the film "Devil in Miss Jones" which was being shown at the same theater in conjunction with "Deep Throat." On July 31, 1974, a second search warrant was issued and a second copy seized. This search warrant was issued in conjunction with an order to show cause requesting defendants to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at defendants' request, and show cause why all copies in the possession of the theater should not be seized. The warrant further provided that if defendants had no additional copies available for showing, the second copy would be returned pending the Friday hearing. As to each seizure, state criminal complaints have been filed and are pending.

On Friday, counsel for defendants appeared before the Orange County Superior Court and stated that he did not believe the state court had jurisdiction to hold the hearing and when the court declared itself ready to proceed on the merits, the attorney walked out of the courtroom. The state court viewed the movie, heard evidence and issued its order of seizure for all copies

of the film in the theater's possession. The state judges issuing the warrants, because of the orders to return evidence in state causes priorly made by Federal District Court Judges, have in *all the above warrants, including the November 23 and 24, 1973, warrants, ordered the seized films returned to the court itself in whose direct possession they presently are.*

On August 1, 1974, a message was left with Appellant Sears which stated that Mr. Brown had an appointment with Judge Ferguson for 10:00 a.m. on Saturday morning, August 3, 1974, and that he would request an order (unspecified) at that time. On August 2, 1974, when Mr. Brown's associate appeared in the state court, no service was made of any type and nothing was said about the Saturday appointment to Appellant Sears or to other Appellants.

On Saturday, August 3, 1974, the Federal Court issued an order to show cause *in re* contempt and a temporary restraining order. All Appellants were ordered to appear on August 12, 1974, and show cause why they should not be found in contempt of the order to return issued in the declaratory judgment of the three-judge court. (See Appendix C.) Seizures of the movies "Deep Throat" and "Devil in Miss Jones" were temporarily restrained as violative of the June 4, 1974, order and Appellants were further ordered to show cause why future seizures and prosecutions should not be prohibited and all items seized ordered returned. (See Appendix C.)

On August 3, 1974, an application for stay was made to the United States Supreme Court.

On August 12, 1974, even though Appellees had requested permission to oppose the Petition for stay and

were thus expected to forego enforcement of the judgment below until the application had been disposed of, they argued for a finding of contempt and for the granting of injunctive relief.

Judge Ferguson, one of the three-judge panel, after hearing argument, indicated that the three-judge court was considering the issue of whether the July 26, 1974, *Miller v. California* opinion of this Court required reversal but further indicated that the issue was a "difficult one" and that he did not know *when* an opinion by that court would be forthcoming.

Thereafter Judge Ferguson vacated the order to show cause *in re* contempt "because" the court still had "under consideration" the issue of whether to grant or deny a stay. Appellees having withdrawn their request for such relief, he vacated the order to show cause why the copies seized on July 29, 30 and 31, 1974, should not be ordered returned and why further criminal prosecutions should not be enjoined.

Judge Ferguson then asked why Orange County authorities had conducted further seizures while the *Miranda v. Hicks* decision was still in effect. Appellants answered that the "declaratory" judgment opinion did not preclude future seizures and prosecutions. Judge Ferguson then stated that the *only* reason why the three-judge court had not issued an injunction was because the Court believed an injunction to be unnecessary. Accordingly, Judge Ferguson ordered Appellants to abstain from further seizures of the movies "Deep Throat" and "Devil in Miss Jones."

THE QUESTIONS ARE SUBSTANTIAL.

I

The Court Below Has Departed From the Accepted and Usual Course of Judicial Proceedings.

The record shows that the case had originally been assigned to Judge Ferguson who disqualified himself. The request for injunction was subsequently submitted to Judge Lydick who, on the affidavits before him, found that an injunction under the Civil Rights Act would have been improper *because* the Appellees had failed to make any showing whatever that Appellants had acted in bad faith. Judge Lydick, however, did determine that a three-judge court should be impaneled to decide the constitutionality of the state statute and duly certified the case. The Chief Judge of the Circuit impaneled *three* judges: William G. East, Warren J. Ferguson and Walter Ely. Since the court was not duly constituted under 28 U.S.C. §2284, it did not have jurisdiction to hear the matter and to grant injunctive relief. 28 U.S.C. §2284 specifies:

> In an action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, *who shall designate two other judges,* at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

The statutory requirement that the judge to "whom the application for injunction or other relief" *shall* constitute one member of such court is integral to the very purpose of the statute since *that* particular judge is the one who makes preliminary factual determination that a three-judge court is needed. He is also the judge to whom the case is remanded once the purpose for which the three-judge court was convened has been concluded. (See *e.g., Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1971); see also *Public Service Commission v. Brashear Freight Lines, Inc.,* 312 U.S. 621, 85 L.Ed. 1083 (1941).) His decisions on most issues of fact will be and are upheld on appeal unless patently erroneous. In a case such as the one at hand, for example, failure to include the judge who called for the convening of the three-judge court resulted in a denial of a constitutional as well as procedural due process. Judge Lydick's opinion absolved Appellants of any wrongdoing. The three-judge court, based on the *same* evidence which was before Judge Lydick, made a finding that the "uncontroverted facts" show harassment. Since a claim for damages which had originally been filed was dismissed without prejudice, the finding of harassment places Appellants in the unenviable position of having had the key issue in a damage suit conclusively determined against them without a hearing on the merits.

Additionally, Judge Lydick's original determination of the issue in Appellants' favor lulled Appellants into a false sense of security and, assuming but not granting a final determination of the issue to have been properly ordered submitted upon affidavits, it caused Appellants to believe no additional affidavits were needed since, as the decision itself admits, the acts of "harassment" consisted of seizures carried out under

authority of search warrants issued by a state judge who, on at least two occasions, was present at the seizure.

The statute provides that *only* a court composed as mandated by the statute can hear and determine the matter. The word "shall" is mandatory and a court of three judges which does not include the judge who first heard the matter is not a court composed under the statute.

II

The District Court Decided the Case in a Manner Not in Accord With Applicable Decisions of This Court by Failing to Abstain.

A. Whereas the Criminal Proceedings Against the Agents of Plaintiffs Were Pending at the Time the Federal Complaint Was Filed, Federal Court Must Abstain.

In determining that issuance of the injunctive order to return the seized evidence was proper, the District Court sought to distinguish *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuel v. Mackell,* 401 U.S. 66 (1971) by stating that in the case at hand there are no pending state proceedings against the Appellees and by concluding that:

> . . . the fact that there may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief.

The court apparently does not recognize the presently pending prosecutions against Miranda because instituted before impaneling of the three-judge court, but after the filing of the Federal Complaint. Even if this contention is correct, the existence of pending state prosecutions initiated prior to the filing of the federal

action against some of the theater employees cannot be denied. It is shown in the record and is admitted by Appellees' own affidavits. As pointed out by *Allee v. Medrano,* 94 S.Ct. 2191, 2208 (Justice Burger's concurring opinion) where there is an identity of interest between the defendants in the state criminal case and the plaintiffs in the federal action, the applicable standards are those of *Younger v. Harris, supra,* and not those of *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209, 39 L.Ed.2d 505. The identity of interests in the case at hand is self-evident and the ability of Appellees to obtain a vindication of their rights in the state court is obvious since what Appellees are complaining of are the seizures from the theater employees.

Under the rules set forth in *Perez v. Ledesma, supra,* federal intervention either by way of injunction or by way of declaratory relief should issue:

> *Only* in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid convinction and perhaps in other extraordinary circumstances where irreparable injury can be shown . . .

In the case at hand, the record shows that four films were seized because they were different one from the other. Each was seized pursuant to a search warrant and the determination of the existence of substantial differences was made in at least one of the three instances in question by the magistrate *prior* to the issuance of the search warrant. The existence of such differences is further supported by the affidavits which show that Appellees themselves admitted to the existence of more than one version.

The seizures occurred on November 23 and 24. On November 26, an order to show cause was served

on the Appellees ordering them to appear in the State Superior Court for an adversary hearing on the issue of obscenity. Appellees alleged that "bad faith" in this case was further evidenced by the fact that Appellants obtained an *ex parte* temporary restraining order against the showing of the film. Although it is true that such an order was obtained as part of the order to show cause, this Honorable Court should consider the strong protective limitations contained within the order as well as the purpose of the order. The first limitation in the order is a time factor. The order asked Plaintiffs not to show the movie until after a *judicial determination* was held in an *adversary* hearing and provided that the adversary hearing should be had within five days or at any prior time at Appellees' request upon *one hour's* notice to Appellants. Appellees did *in fact* request a hearing on the *same* day the order was issued and were in fact given a hearing on that *same date*. Certainly neither the Orange County Superior Court nor Appellants can be blamed because Appellees, after requesting a hearing, declared themselves to be *beyond* the jurisdiction of the State court and though "not meaning any disrespect" refused to argue the merits of the obscenity issue.

The District Court found that the "objective facts" described in the opinion:

> . . . clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie "Deep Throat" out of Buena Park.

Appellants submit that four seizures under valid search warrants during a two-day period and followed by an adversary hearing are *not* "harassment" and "bad faith" within the clear meaning of *Younger v. Harris, supra,* and *Perez v. Ledesma, supra.* See also *Com. of Pa. ex rel. Feiling v. Sincavage,* 439 F.2d 1133 (3d Cir. 1971); *Robbins v. Bryant,* 349 F.Supp. 94, affirmed 474 F.2d 1342; *Boyd v. Hoffman,* 342 F.Supp. 787; *Summers v. McNamara,* 239 F.Supp. 806; *Wilhem v. Turner,* 298 F.Supp. 1335, affirmed 431 F. 2d 177, *cert. den.* 401 U.S. 947, 28 L.Ed.2d 230; *Fowler v. Alexander,* 340 F.Supp. 168, affirmed 478 F.2d 694; *Link v. Greyhound Corp.,* 288 F.Supp. 898; *Quinnette v. Garland,* 277 F.Supp. 999; *Haigh v. Snidow,* 231 F.Supp. 324; *Rhodes v. Huston,* 202 F. Supp. 624, affirmed 309 F.2d 959, *cert. den.* 383 U.S. 971, 16 L.Ed.2d 311.

B. Where, as Here, Criminal Proceedings Were Filed Against Plaintiffs Only Eight Days After the Court Was Impaneled and Were Pending at the Time Declaratory Judgment Was Considered, Abstention Is Mandated.

The Opinion of the Three-Judge Court (p. 8) states that it need not abstain from involving itself in this matter as there is no danger of duplicative proceedings or disruption of the state criminal justice system. This finding of the court is belied by the existence of the pending criminal charges.

The court's Opinion relies heavily upon *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209 (1974). The United States Supreme Court there specifically set out the focus of its holding in that case as follows:

> The case presents the important question reserved in *Samuels v. Mackell,* whether declaratory

relief is precluded when a state prosecution has been threatened but is not pending. . . . (94 S.Ct. 1213) (Citations omitted.)

The Federal court interpreted this to mean that the federal court could take jurisdiction if state proceedings had not been filed at the time the federal complaint was filed. The majority of the justices, however, have actually expressed agreement on the fact that the propriety of abstention is to be determined at the time of the *hearing*. The concurring opinion of Mr. Justice Brennan in *Perez v. Ledesma*, 401 U.S. 82, 103, 27 L.Ed.2d 701, 716 (1971), which expresses the views of Mr. Justice White and Mr. Justice Marshall, specifies that:

> The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the *hearing* and not upon the situation when the federal suit was initiated. See *Golden v. Zwickler*, 394 U.S. at 108, 22 L.Ed.2d at 117. (Emphasis added.)

The concurring opinion of Mr. Justice Rehnquist (with whom the Chief Justice joined) in *Steffel v. Thompson*, 415 U.S. ...., 94 S.Ct. 1209, 1225-1226, indicates that:

> . . . any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*.

The limitation imposed on Mr. Justice Rehnquist's views by the concurring opinion of Mr. Justice White are to the effect that:

> . . . a federal suit challenging a state criminal statute on federal constitutional grounds could be

> sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

Where as in this case the criminal complaint as to the theater manager was filed on November 26, 1973, before filing of the federal complaint, and where as here, the criminal complaint was amended to include Appellees on Januarv 15—approximately seven days after impaneling of the three-judge court and *one month* before Appellants were notified that the court had in fact been empaneled—*Steffel, supra,* as well as all other prior decisions of this Honorable Court, mandate abstention.

C. Where, as Here, Interference With the State Criminal Proceedings Was Apparent and Unavoidable, Abstention Is Mandated.

The very principle upon which *Steffel, supra,* rests the propriety of issuance of a declaratory judgment in the instances therein contemplated, is the recognition that a declaratory judgment is "less abrasive" than an injunctive remedy and will have a "less intrusive effect on the administration of state criminal laws." The magnitude of the "intrusion" and its "abrasiveness" in the case at hand is readily apparent.

The three-judge court in taking *and maintaining* jurisdiction over the action and in issuing an injunction against further seizures of other movies has provided the defendants in state criminal proceedings with a ready-made scheme to bypass and literally thumb their noses at the state courts. Evidence in the custody of the state court and which is the basis of the criminal

proceedings is ordered returned. Although the defendants appear and answer to the state criminal charges they do so knowing that evidence of those charges will be gone at the time of trial. Although the defendants *demand* an adversary hearing prior to a seizure of additional copies, when the state court attempts to give them a hearing, they decline to appear, or if they do appear, they do so to tell the state court that they will not bother to argue the merits because the state court "lacks jurisdiction."

The duplications and contradictions involved are further evidenced by the direct conflict between the orders issued by the state courts and the order of the Federal court. The Superior Court judge held an adversary hearing and found the movie to be obscene. The seizures were held to be constitutional by a Federal judge (Judge Lydick). The Federal Plaintiff as defendant in the state criminal action moved to suppress as evidence and for the return of those same movies in the Orange County Municipal Court. The Orange County Municipal Court held two of the seizures invalid. An appeal from that order of the Municipal Court was duly filed and the appeal was pending before the state appellate court when the order of the three-judge court issued declaring the seizures to be "harassment" and ordering the movies returned. The Appellate Department of the Superior Court in due course issued an order in the criminal proceedings telling the municipal judge who holds the evidence and *who is subject to that order* that he cannot return the

films because they are properly seized and are contraband. The Orange County Superior Court orders an adversary hearing. Defendants walk out stating that the court lacks jurisdiction. After the hearing the Superior Court orders the seizure of all copies. The Federal court retaliates by threatening to hold the District Attorney and the Chief of Police in contempt and by countermanding the order of the Orange County Superior Court. Disruption of state proceedings!?!

In passim, it should be noted that the *one* truly important legal issue for determination in the state cases is whether after an adversary hearing a state court can order the seizure of additional copies of the film. A secondary but just as important legal question relates to the interpretation of California Penal Code Sections 1524-1540 as they relate to the holding of adversary hearings. Had the three-judge court refused to interfere, the Federal Plaintiffs would have litigated those issues where the issues belonged—in the state court proceedings. Instead they decided to ignore the fact that the order of seizure after adversary hearing is a *search warrant* and that the taking of evidence by the issuing magistrate is specifically provided for in California Penal Code Section 1526. They have conveniently blinded themselves to the fact that *each search warrant* is severely limited in scope and duration by those sections of the Penal Code and have optioned (understandably on their part) to argue "harassment" before a three-judge court who ends up as a court with apparent appellate jurisdiction over the Appellate Courts of the State of California.

By allowing the Appellees to argue the matter in the Federal Courts after their refusal to submit to the jurisdiction of the State Courts and to pursue their appellate remedy as to the jurisdictional issue prior to intervening, the Federal Court *presumed* and *assumed* inability on the part of all levels of State Courts to do justice. Since Appellees' original argument centered on the validity of State Statutes regulating searches and seizures, the action of the Federal Court had the further effect of obstructing the proper administration of justice by precluding an authoritative determination of the issue—a key issue in this case—by the California Appellate Court. Nor is federal intervention excused by need for speed since the California Appellate Court, Fourth Appellate District, has been consistent in its granting of *immediate* stays pending consideration of the merits of any issue of First Amendment importance. (Had the Federal Court taken evidence in this case, the testimony of the Court Clerk would have shown this to be true.) Appellants respectfully submit that the old and well-established concepts of comity strongly argue gross abuse of discretion on the part of the Federal Court in deciding to intervene under the circumstances of this case, an abuse that can only tend to encourage future similar actions and thus can only tend to encourage disrespect for the authority of a sister court—and for all courts—and lead to the very abuses decried by *Steffanelli v. Minard,* 342 U.S. 117, 123-34 (1951), and *Veen v. Davis,* 326 F.Supp. 116, 117 (C.D. Cal. 1971).

D. Where, as Here, the Complaint Seeks Recovery of Property in the Custody of a State Court of Prior Jurisdiction, Intervention by the Federal Court Is Prohibited.

In *Donovan v. Dallas,* 377 U.S. 408, 411, 12 L.Ed. 2d 409, 413 (1964), the Supreme Court points out that when the aim of the proceedings is property in the custody of a state court the proceedings are *in rem* or *quasi rem* proceedings. In such cases, the jurisdiction with the Court having custody is *exclusive:*

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson,* 305 U.S. 456, 456-468, 83 L. Ed. 285, 290-292, 59 S.Ct. 275.

Moreover, even where the state court and the federal court have concurrent jurisdiction, the first court issuing its decision does not and *cannot* enforce the judgment it renders by contempt or injunction. Rather, the opinion states the proper method of procedure to be as follows:

> In Princess Lida this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Id.,* at 466, 83 L.Ed. at 291. See also *Kline v. Burke Construction Co.,* 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.

To the same effect are *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 86 L.Ed. 100 (1941); *Purcell v. Summers*, 126 F.2d 390 (4th Cir. 1941) *cert. den.* 317 U.S. 640, 87 L.Ed. 516. See also *Phillips v. City of Atlanta*, 57 F.Supp. 588; *Downing v. Davis*, 34 F.Supp. 872; *White v. Crow*, 17 Fed. 98, affirmed 110 U.S. 183, 28 L.Ed 113 (1884).

In the case at hand, since all of the property to which the June 4 order to return is directed as well as the property sought to be returned *is* in the custody of the state court and is evidence in criminal proceedings, the Federal court order to return is jurisdictionally defective.

E. The Actions of Appellants Have Been Improperly Termed Harassment Because They Were Legal Actions Performed Under Validly Issued Orders of the State Court and in the Absence of Harassment the Court's Abstention Was Mandated.

The proposition that an official cannot be guilty of harassment when he legally performs his legal duty is obviously unquestionable, just as it is unquestionable that if the seizures were legal they cannot constitute harassment. Moreover, if a prosecutor honestly believes the law to be as he enforces it, and if his position is rational, he cannot be guilty of harassment. The jurisdiction of the state court to hold prior adversary hearings under authority of Penal Code Sections 1526-1540 is not in question.

Those statutes have always been interpreted as requiring the magistrate to make an immediate determination of the issue of obscenity at an adversary hearing. (*Cf. Zeitlin v. Arnebergh*, 59 Cal.2d 901; *Aday v. Superior Court*, 55 Cal.2d 789; *Aday v. Municipal Court*, 210 Cal.App.2d 229; *People v. Superior Court (Loar)*, 28 Cal.App.3d 600.) Under the requirements set

forth by this Honorable Court, an adversary hearing and a prompt final judicial determination of the issue of obscenity must be had *before* a seizure of all available copies pending trial can be ordered.

Within the purview of the California search and seizure statutes in compliance with the mandated First Amendment requirements, California magistrates can, upon affidavits supporting probable cause, issue a search warrant for the seizure of *one* copy of a film (Penal Code §1525). Under authority of Penal Code Sections 1540 and 1536, the courts are under a duty to ascertain whether the material is in fact contraband (*i.e.*, obscene) and to order the same returned forthwith if they find it to be not obscene. They can thus order the parties to appear before the court to determine that issue. If after a hearing the court finds the material to be obscene, the prior judicial determination requirement is satisfied and a warrant can issue for the seizure of all copies.

The reviewability and concomitant finality of the court's determination is shown by such cases as *Aday v. Superior Court, supra*, which hold that a Petition for Writ of Prohibition and a Petition for Hearing can be taken from such determination.

Plaintiffs have contended (and the three-judge court has apparently so held in light of their August 3, 1974, order to show cause *in re* contempt) that a *final judicial* determination of obscenity must be made at the trial and that only one copy can be seized prior to that time. The argument, Defendants contend, flies in the face of logic, common sense, *Aday v. Superior Court, supra*, and *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789. A defendant can avoid multiple seizures and prosecutions by *refraining* from showing a movie held to be obscene after an adversary proceeding until the jury

trial has been had, a period of not more than 40 days under California law unless at defendant's request. To hold otherwise is to say that a *judicial* determination is a meaningless act which allows the defendant to keep on committing that which the courts have determined to be a crime and which is, therefore, presumptively a crime.

Moreover, the clear meaning of the cases establishes a *judicial* not a jury determination. *Heller, supra,* as well as all of its precursors, do not speak of a *jury* determination but of a *judicial* determination of the issue of obscenity. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), this Honorable Court expressly rejected the concept of a binding jury determination on the issue of obscenity. In that case the Court held that the *judges* have the *duty* to protect free expression by making an independent constitutional determination of obscenity of the materials before it and stated:

> Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

At note 3 of that same opinion, the United States Supreme Court concluded:

> It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, *neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression.*

In compliance with the United States Supreme Court mandates, the California Supreme Court, in *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909, held that the *court* in each case *must* make an independent determination of the obscenity of the material and concluded:

> . . . we believe that this issue must be resolved by this court; it cannot properly be reposed in a jury for final disposition as a question of fact. The crux of our case is whether the definition of obscene matter in Penal Code section 311 sanctions prosecution of sellers of "Tropic of Cancer" and whether the constitutional guarantees of freedom of speech and freecom of the press (U.S. Const., 1st and 14th Amends.; Cal. Const., art. I §9) permit such prosecution. As we shall point out in more detail, the courts have long recognized that such questions of statutory and constitutional constitutional construction and application call for court decisions; they raise issues, not of the ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; the court itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene.

The rationale of the California Court is best expressed in its statement that:

> The determination of what is obscene in the statutory or constitutional sense is not a question of fact (i.e., a question of what happened), but rather is a question of fact mixed with a determination of law; a "constitutional fact."

Aday v. Superior Court, 55 Cal.2d 789; *Aday v. Municipal Court,* 210 Cal.App.2d 229; and *People v. Superior Court,* 28 Cal.App.2d 600, show that a *judicial* determination of the issue of obscenity is to be had at a special hearing as soon as possible after seizure.

Allowing the jury to be the "definitive determinant" of the obscenity of the material is also contrary to presently articulated principles of law. As *Miller v. California, supra,* at note 9 recognizes:

> The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States, supra,* 354 U.S., at 492, n. 30 (1957), "[I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States,* 165 U.S. 486, 499-500."

Zeitlin v. Arnebergh, 59 Cal.2d 901, 907, points to the inconclusiveness of a jury verdict and states:

> A finding of guilt of one purveyor of obscene publications will not necessarily discourage others; indeed such vendors characteristically operate undercover and are inclined to recidivism. If, on the other hand, a verdict expresses a determination that the material is not obscene the city attorney is still free to prosecute another bookseller for selling the same publication. If a criminal verdict, whether of guilt or of innocence, operates primarily within a particular county to ban the book in the case of guilt, or to encourage its sale in the case of innocence, an opposite result might readily obtain in another country. Such an approach must inevitably engender a hodgepodge pattern of suppression and sale.

That same principle was recognized in *Bernard v. Municipal Court,* 142 Cal.App.2d 324, where the court, after a jury acquittal refused to return the materials because they were obscene.

United States v. West Coast News Co., 228 F.Supp. 171, affirmed 357 F.2d 855 (6th Cir. 1966), reversed on other grounds. 388 U.S. 447, 18 L.Ed.2d 1309 (1967) also supports appellants' contention. In that case defendant had been priorly tried and acquitted of a similar charge. After noting that the book had not been presented to the jury in the prior case, the court concluded that *even* if the book had been presented and *even* if the jury had acquitted him, neither double jeopardy nor *res judicata* were applicable because:

> . . . defendant Aday was not charged with the same offense in the District Court in California as that with which he is charged in this case. Besides the fact that the book, *The Black Night,* was never submitted to the jury, the indictment in that case charged transportation of that book to different places on different dates than the indictment in this case. See 18 U.S.C. §3237(a).

If the book had been submitted to the jury, and if the jury had acquitted defendant Aday on the count naming the book, *The Black Night, it would still be impossible to know whether or not the jury based its acquittal upon the fact of non-obscenity. It is as reasonable to assume that they may have acquitted defendant Aday on grounds of lack of scienter, or non-transportation.* (Emphasis added.)

That same court also points out that *each* act of mailing is a separately prosecutable offense and that:

In fact, the statutes involved in this case contemplate that a defendant may be acquitted for sending a book to one place, and found guilty for sending the same book to another place. Footnote 30 to the majority's opinion in the *Roth* case, *supra,* stated:

"It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop v. United States,* 165 U.S. 486, 499-500 [17 S.Ct. 375, 379-380, 41 L. Ed. 799]."

In *State v. Ell-Gee, Inc.,* 255 So.2d 542, for example, the Florida Court of Appeals held against Defendants who had made the following contention:

Essentially, appellees' reliance is upon its argument that the performance of a play, even though in violation of the several lewdness and obscen-

ity statutes and ordinances, is a continuing performance throughout its run and therefore constitutes but a single episode or transaction within the meaning of *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and consequently the conviction in the Municipal Court of Miami Beach foreclosed any prosecution for an earlier performance of the same play, under the Double Jeopardy Clause, of the Fifth Amendment, or under the Doctrine of Collateral Estoppel.

The Court, in rejecting Defendants' double jeopardy claim and in reversing the finding of the Court below, concluded:

Each performance of the play constituted a separate incident, transaction or episode even though the same words were spoken and the same exposure indulged in. We equate this activity with that of a bookmaker taking separate bets on separate days on any gambling activity, or a prostitute plying her activities day after day, or separate acts of incest committed with the same victim on separate days, or the uttering of a continuous series of forgeries on the same person's account in the same bank, or the shooting of a number of persons with the same gun during a single demonstration or uprising.

Here, each performance of the play presumably was before a different audience, so that the lewd and lascivious conduct or obscenity was portrayed at different times before different persons. The fact that the same words were used and the same lascivious conduct was indulged in does not convert the separate activities into a continuous transaction or continuing activity.

Steffel v. Thompson, Younger v. Harris, and *Perez v. Ledesma* make clear that harassment equals "prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." Where, as in the case at hand, the procedures adopted have been found to be constitutional; where, as here, the law, though unsettled, argues in favor of the legality of Appellants' acts and in favor of the success of the prosecutions, several copies seized, each under a separate search warrant, cannot in and of themselves constitute harassment. Even before the July 25, 1974, *Miller v. California* decision by this Court, the allegation of harassment was improper and fictitious. After July 25, 1974, such an allegation (which must perforce imply a belief on the part of the prosecution that the California obscenity law is invalid) is wholly untenable. Absent proven harassment, the three-judge court abused its discretion in the exercise of jurisdiction and in granting any and all types of injunction.

F. The Validity of the Order of Injunction Issued by Judge Ferguson on August 3, 1974, Prohibiting Future Seizures Is Properly to Be Determined as Part of This Appeal.

Appellants are uncertain as to the exact nature of the injunctive order issued by the Court on August 12, 1974. Unquestionably, the order was issued in this case. Just as unquestionably it was issued by one of the members of the three-judge court. Moreover, the order is also unquestionably injunctive in nature. Since it is an injunctive order directly prohibiting the enforcement of a state statute by precluding the seizure of necessary evidence, the order is one which can only be issued by the three-judge court through the issuing judge or is a "writ of assistance" to effectuate the June 4 judgment. (It ob-

viously cannot be a temporary injunction since that was issued on August 3, 1974.) But, however termed, the validity of such an order is totally dependent on the validity of the June 4, 1974, judgment and becomes void and unenforceable when and if that judgment is vacated.

Although *one case, Hamilton v. Nakai,* 453 F.2d 152, 161 (9th Cir. 1971), holds such an order to be appealable to the Circuit Court of Appeals, that case does so under authority of *Hicks v. Pleasure House, Inc.,* 404 U.S. 1, 30 L.Ed.2d 1. That case with which Appellants are unfortunately familiar deals with temporary restraining orders issued *prior* to the convening of a three-judge court. Moreover, in that case, an appeal had already been had and the decision of the three-judge court had already been finally determined by this Honorable Court.

In a case such as the present one where the order is one which sets forth the "scope" of the prior order of injunction issued by the three-judge court, the order should be considered as *defining* the prior order and should be determined as part and parcel of the June 4, 1974, judgment from which this appeal is taken. This is especially true when issuance of the order was at the instigation of Appellees while consideration of an application for stay intended to avoid the issuance of just such an order was pending before this Court. Appellees, in return for being allowed to present their opposition to the application, were required to forego enforcement of the judgment pending a determination of the application for stay. Their failure to do so cannot be made to further damage Appellants by requiring them to conduct separate appeals.

Consideration of the order as one issued by the three-judge court in a case such as this has been advocated by Mr. Justice Harlan acting as circuit court judge in *Breswick and Co. v. United States of America,* 100 L.Ed. 1510, 1515, who, in granting a stay under somewhat similar circumstances, concluded:

> I find no substance to the plaintiff's contention that Alleghany's present application is premature. I am disposed to think that the signature of one judge to the injunction order, which conformed to the majority opinion of the three-judge court as to the scope of the injunction, satisfied the requirements of 28 USC §2284. However, if I am wrong, then consummation of the preferred stock plan would not violate a valid injunction order and the say whiich I am granting would be of no account.

Finally, the order of August 3, 1974, is so intimately connected with the validity of the June 4, 1974, order that a final determination as to the validity of that order also finally determines the validity of the August 3, 1974, order.

As *United States v. United Mine Workers of America,* 330 U.S. 258, 295 (1947), points out:

> The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worder v. Searls, supra* (121 U.S. at 25, 26, 30 L.Ed. 857, 858); *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.* (CCA 2d) 86 F. 2d 727 (1936); *S. Anargyros, Inc. v. Anargyros & Co.* (CC) 191 F. 208 (1911), and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court.

That same Court at note 61 points to the following additional authorities, all of which support Appellants' contentions:

> *Leman v. Krentler-Arnold Hinge Last Co.,* 284 U.S. 448, 453, 76 L.Ed. 389, 394, 52 S.Ct. 238 (1932); *Bessett v. W. B. Conkey Co.,* 194 U.S. 324, 329, 48 L.Ed. 997, 1002, 24 S.Ct. 665 (1904); *McCann v. New York Stock Exchange* (CCA 2d) 80 F.2d 211, 214 (1935). In accord in the case of settlement is *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 451, 452, 55 L.Ed. 797, 809, 810, 31 S.Ct. 492, 34 LRA(NS) 874 (1911): ". . . when the main cause was terminated . . . between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character."

III

The District Court Has Decided an Important Federal Question in a Manner Which Is in Direct Conflict With the Decision of the California Supreme Court, the California Appellate Court and of This Court.

The memorandum opinion of the District Court holds that California Penal Code sections 311, 311.2, *et seq.,* are unconstitutional under the criteria set forth in *Miller v. California.* Those same statutes have been held to be constitutional as interpreted by the California Appellate Court in *People v. Enskat,* 35 Cal. App.3d 900. After the District Court opinion had issued the California Supreme Court has reaffirmed the *Enskat* decision by denying a petition for Writ of *Habeas Corpus* in the case of *In re Kroomer* and specifically mentioning *Enskat* as the basis for the denial.

On July 25, 1974, the Supreme Court issued its decision in the case of *Marvin Miller v. State of California*, No. 73-1508.

The majority opinion there states:

> The appeal is dismissed for want of a substantial federal question.

The dissent written by Mr. Justice Brennan recites that:

> Appellant was convicted in Orange County, California Superior Court of disturbing obscene matter in violation of California Penal Code §311.2. . . .

After setting forth the text of the California Obscenity Statutes, the dissent goes on to say:

> The Appellate Department of the Superior Court affirmed, and this Court vacated the judgment of that court and remanded the case for reconsideration in light of *Miller v. California*, 413 U.S. 15 (1973), and companion cases. The Appellate Department again affirmed.

In context, the decision, therefore, makes clear that this is a conviction under the California Obscenity Statute reconsidered and reaffirmed by a California court in light of the *Miller v. California, supra*, requirements of specificity. A dismissal of the appeal "for want of a substantial federal question" under the circumstances is a decision on the merits, determinative of the constitutionality of the California obscenity legislation as interpreted by the California Appellate Courts. This fact is pointed out in *Eaton v. Price*, 360 U.S.

246, 3 L.Ed.2d 1200, 1203 (1959), where the Court concludes:

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .

Such a determination on the merit, of course, makes the case controlling as precedent. (See *Eaton v. Price*, 360 U.S. 246, 247, 3 L.Ed.2d 1200, 1202, 79 S.Ct. 978 [opinion of Brennan, J.]; *Ahern v. Murphy* (7th Cir. 1972) 457 F.2d 363, 365; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.*, 71 Cal.2d 1215, 1221, fn. 4 [81 Cal.Rptr. 251, 459 P.2d 667]; Wright, Law of Federal Courts, 495; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review*, 64 Colum.L.Rev. 1, 11) and of value as precedent under the doctrine of *stare decisis. Eaton v. Price, supra; Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra; People v. United National Life Ins. Co.*, 66 Cal.2d 577, 591 [58 Cal.Rptr. 599, 427 P.2d 199]; *Two Guys from Harrison-Allentown, Inc v. McGinley*, 179 F.Supp. 944, 949, fn.4, revd. on other grounds, 366 U.S. 582, 6 L.Ed.2d 551, 31 S.Ct. 1135.)

As pointed out by *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972), the conclusion of its binding precedent value is inescapable in that where a decision of a state court is based on a criminal state statute, the *only* ground for appellate jurisdiction in the United States Supreme Court is an allegation under 28 U.S.C. §1257(2) that:

> There is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States and the decision is in favor ot its validity.

Quite clearly a dismissal for want of a substantial federal question comports with it a finding that jurisdiction in the United States Supreme Court exists by virtue of a claim of alleged invalidity and a ruling that the claim of invalidity lacks merit. (The United States Court of Appeals for the Ninth Circuit has so held in *Cross v. Bruning,* 413 F.2d 678 (9th Cir. 1969)).

IV

The Three-Judge Federal Court Has Determined an Important Issue Which Has Never Been Conclusively Decided by This Honorable Court in a Manner Which Appears to Be in Conflict With the Opinions of This Honorable Court.

In *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209, 1221 this Honorable Court differentiated between Federal court intervention by way of a declaratory judgment and by injunction. The *Steffel* opinion reiterates the *Perez v. Ledesma, supra,* rationale, and concludes that Federal court interference by way of declaratory judgment is proper because the *effect* of a declaration of unconstitutionality by the Federal court does not preclude future prosecutions. On the contrary:

> . . . where the highest court of a State has had an opportunity to give a statute regulating expression of a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prose-

> cution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction. . . . [T]he federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the govering rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt. (Footnote omitted.)

Although the meaning of the majority opinion does strongly imply that where as in the case at hand an intervening decision by this Honorable Court shows the statute to be constitutional, the prosecutor can rightfully and with immunity, enforce that law (*cf.* the concurring opinion by Mr. Justice Rehnquist and the Chief Justice), the concurring opinion of Mr. Justice White implies that the court "might" feel otherwise. Mr. Justice White in fact states:

> It should be noted, first, that his [Mr. Justice Renquist's] views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

The issues left undecided by the above decision are very much in issue in the present case.

Although the three-judge court issued only one official opinion, it had before it several other cases involving San Bernardino, Riverside, San Diego and Los Angeles counties as well as some cities within those counties. In each of those cases the three-judge court issued orders stating that all those cases were controlled by the *Miranda v. Hicks* decision.

Cecil Hicks, Oretta Sears and the Buena Park Police Department, therefore, though necessarily more visible by virtue of selection of their case for adjudication, are not the only persons affected by the undetermined scope of the injunction and coercive nature of the decision. Although it may well be that if this Honorable Court does not grant relief, the Appellants herein will be the only ones to suffer personal hardships and monetary damages, unless relief is granted by this Honorable Court no prosecutor, or judge in the state system, for that matter, will be able to honestly enforce the very laws this Court has declared to be constitutionally valid without being faced by the most unpleasant, indeed, frightening specter of "contempt of federal court". The independence of the state court system is also at issue in a very real sense. The state courts whose orders are being flaunted by defendants have indicated by their heretofore entered decisions that they will not release items which are evidence in their criminal proceedings and duly adjudicated by them to be contraband. Since their jurisdiction preceded that of the Federal court, return of the items in their custody could only be mandated by a court of higher jurisdiction on appeal from the criminal proceedings. Prosecutors all over the state will thus be in the unenviable position of being unable to comply with the orders of the Federal court.

It is possible that the methods of seizures used by Appellants (seizure of more than one copy after adversary hearing) might be eventually held to be improper, but since the impropriety if any, relates to the construction of state statutes (California Penal Code sections 1526-1540) any interpretation must come first from the state courts.

Finally, the principle that a citizen should not be made to undergo criminal proceedings to test the validity of a state law—the very principle underlying the *Steffel* opinion, requires that state prosecutors and police officers who act pursuant to orders issued by state courts not be made to suffer contempt charges and taxing Federal court suits because of the vagueness of what is the effect of a federal declaratory judgment. The constitution requires that the magistrate, not the police officer, not the prosecutor, determine when and if a warrant shall issue. And the magistrate who honestly performs his duty can be told that he is legally wrong by a court of *higher* jurisdiction. He cannot be sued for his honestly mistaken beliefs of what the law is.

By the same token, the law requires the prosecutor to act legally, that is, to go to the magistrate and to make application for search warrants and for hearings. That is the duty of the prosecutor and the scope of the prosecutor's authority. If by acting in compliance with the law and during the performance of his legal duty he can be subjected to repeated federal suits, charges of harassment, threats of contempts, the rights of the People of the State, the very People the constitution is intended to protect, will be seriously impaired for want of aggressive and honest prosecution.

Conclusion.

From all the above reasons, Appellants most respectfully invoke the jurisdiction of this Honorable Court.

Dated this 16th day of August, 1974.

Respectfully submitted,

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APPENDIX A.

Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: June 4, 1974

Before: Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

PER CURIAM.

The primary issue presented is whether the California obscenity statute as interpreted by the state courts of California meets the constitutional standards mandated by the Supreme Court in *Miller v. California,* 413 U.S. 15 (1973). We hold that it does not.

The facts which give rise to the litigation are as follows:

1. On November 20, 1973, anticipating that the movie "Deep Throat" would be exhibited in the City

of Buena Park, in Orange County, California, three members of the Buena Park Police Department traveled to nearby Los Angeles County and there viewed the film in its entirety.

2. On November 21, 1973, an affidavit and warrant were prepared describing the film, and arrangements made for a judge of a Municipal Court to view the film if it was brought to Buena Park.

3. At 12:30 p.m. on November 23, 1973, the officers, a deputy district attorney and the judge attended a showing of the film at plaintiff's theatre in Buena Park.

4. After viewing about 45 minutes of the film, they retired to the sidewalk in front of the theatre, where the judge was presented with the previously prepared documents.

5. A photographer hired by the theatre began photographing the judge and the officers while they reviewed the papers. One of the officers, acting on orders from the judge, stopped the photographer from taking any more pictures and seized the film in his camera.

6. The search warrant was issued, and the officers seized the movie and posters advertising it. In describing the property to be seized, the warrant also contained the following handwritten addition:

> "Money contained in the ticket booth & specifically for a $20.00 bill Ser. # B08574869B."

All the cash in the box office was seized, an amount shown to be $305.00.

7. That afternoon the theatre obtained another copy of the film for exhibition. At 3:00 p.m., the same police officers again viewed the film, and left to get another warrant. The affidavit accompanying the second warrant was an identical copy of the first, but also contains the following handwritten notation:

> "Your affiant further states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. after being viewed by Judge ..... with the exception of certain portions being edited different than the first film seized.
>
> Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse and numerous small changes at different portions of the film."

8. The same Municipal Court judge signed the second warrant without seeing the film again, and the officers returned to the theatre at 4:30 p.m. Another copy of "Deep Throat" was seized, along with some advertising posters.

9. The typed second warrant was also an identical copy of the first, but contained the following handwritten addition in describing the property to be seized: "Money contained in the ticket booth cash drawer." $159.00 in cash was seized from the box office.

10. The theatre obtained yet another copy of "Deep Throat." At 7:45 p.m. the same day, the same officers again returned to the theatre and viewed the film in its entirety. They then contacted the judge, who signed another search warrant at 9:00 p.m. The affidavit in support of the warrant was identical to the first and second, but contained the following handwritten notation:

> "Your affiant states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. and 4:35 p.m. after being viewed by the Honorable Judge .... who issued a search warrant.

Your affiant states that the film in question is the same film viewed by Judge ..... with the exception of certain portions of the film being edited differently than the film viewed by the Honorable Judge ....

Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse not shown in the copy viewed by Judge ..... and numerous small changes at different portions of the film."

11. The judge decided he wished to view the film again, and returned with the officers to the theatre at 9:15 p.m. He ordered the officers to execute the warrant, and a third copy of the film was seized.

12. The third warrant was identical to the first and second warrants, but also contained this handwritten notation, describing the property to be seized: "All monies on premises received, in cash drawers or safes at above location." The officers brought a locksmith to the theatre, who opened the business' safe. Money from the cash drawer and the safe totaling $4,082.33 was seized.

13. At 2:30 p.m. the following day, the same officers turned over all the seized items to the judge at his home, and advised him that they believed the movie was going to be shown again.

14. The officers went to the theatre and viewed the film. They returned to the judge's home with another of the identical affidavits, with the same handwritten notation. At 4:00 p.m. the judge signed a search warrant identical to the first three from the day before, with an additional handwritten entry describing the property to be seized: "All monies received, in cash drawers or safes."

15 The warrant was served, and another copy of "Deep Throat", some promotional posters and $197.18 in cash were seized.

16. The theatre ceased exhibition of the movie, closed until November 26, 1974, and thereafter began showing another film.

Plaintiffs in this action are the theatre owner, his property-holding company, and the theatre corporation itself. No criminal complaints are pending against any of them.

Defendants are the District Attorney of the County of Orange, a deputy district attorney, the Chief of Police of the City of Buena Park, and three officers of the Buena Park Police Department.

Plaintiffs filed this lawsuit, basing jurisdiction on 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. In their complaint they seek the return of the motion picture prints seized by defendants, as well as their cash proceeds. In addition, plaintiffs also seek a declaratory judgment under 28 U.S.C. § 2201 and 2202 that California Penal Code §§ 311, 311.2 and 311.5[1] are unconstitutional.

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[1] § 311. *Definitions*

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representations of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is

(This footnote is continued on next page)

Plaintiffs here have no prosecutions pending against them, and have made no allegations that any are

designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

§ 311.2 *Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state*

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

§ 311.5 *Advertising or promoting sale or distribution; solicitation.*

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

threatened. However, it is clear that they do present a real and actual controversy, and do have standing to challenge the constitutionality of the California obscenity statute, since defendants have seized and continue to hold property of the plaintiffs, property which was seized solely because of alleged violations of the California obscenity statute. The Supreme Court has expressly held that a federal court's jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is not diminished by any distinction between personal and property rights. See *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

The Obscenity Statute Abstention

The validity of the California obscenity statute (California Penal Code § 311, et seq.) was not determined by the Supreme Court in *Miller v. California, supra.* The Court, in determining a definition of obscenity which falls outside the protection of the First Amendment, permitted judicial construction of obscenity statutes so that even though the statute on its face violated *Miller,* it may fall within *Miller* by judicial construction. Obviously in *Miller* the Supreme Court did not have the benefit of such construction.

However, since *Miller,* the California courts have authoritatively construed the California statute with regard to *Miller.*

In *People v. Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), *hearing denied* by the California Supreme Court October 24, 1973, the California Court of Appeal determined that the California statute meets the test of *Miller.*

The defendants assert that *Enskat* is now the law in California. *Auto Equity Sales Inc. v. Superior Court,* 57 Cal. 2d 450 (1962) makes it clear in California that the decision rendered by the California Court of Appeal, Second District, Division Five in *Enskat* is ". . . binding upon all the justice and municipal courts and upon all the superior courts of this state, *id.* at 455. Likewise, although a denial of hearing by the California Supreme Court ". . . is not to be regarded as expressing approval of the propositions of law set forth in the opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the California Supreme Court], [citations], it does not follow that such a denial is without significance to [that Court's] views," *Di Genova v. State Board of Education,* 57 Cal. 2d 167, 178 (1962). A denial of hearing ". . . stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by [the California Supreme Court] or until change of the law by legislative action." *Amaya v. Home Ice, Fuel & Supply Co.,* 59 Cal. 2d 295, 306 (1963), quoting from *Cole v. Rush,* 45 Cal. 2d 345 (1955). See also *Klingebiel v. Lockheed Aircraft Corp.,* .... F. 2d .... (9th Cir. Feb. 20, 1974), Slip Opinion at p. 2 n. 2, citing *Stover v. New York Life Insurance Co.,* 311 U.S. 464 (1940). Thus, any defense in state court that the statute is defective under the Federal Constitution would be precluded.

In *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971), the Supreme Court recognized that principles of equity, comity and federalism necessarily limited a federal court's power to issue an injunction or a declaratory judgment when a state prosecution was pending. In *Steffel v. Thompson,* .... U.S. .... (March 19, 1974), however, the Court made it clear that neither *Younger* nor *Samuels* governed the situation in which there was no pending state prosecution. When, in that instance, the relief sought is declaratory in nature, and jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the federal courts have been assigned a "paramount role" in protecting constitutional rights. *Steffel,* Slip Op. at 20.

The situation presents no danger of "duplicative proceedings or disruption of the state criminal justice system," *Steffel* at 9. The role of the federal court is unaffected, whether the attack is to the statute on its face or as applied, *Steffel* at 20-22. Here, the California statute is alleged to be facially invalid, but the decision in *Miller v. California, supra,* requires this court to pay due regard to the state judicial interpretation of the state as well. Finally, the fact that there, may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief. *Steffel* at 18 n. 19. No barriers exist to prevent this court from examining the merits of plaintiff's claim.

Constitutionality

In *Miller,* the standards that state obscenity statutes must meet to comply with the First Amendment are:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The Court stated, "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25.

The issue presented is whether the California statute "as written or construed" specifically defines proscribed sexual conduct. The Court in *Miller* for the first time in its long struggle to define that obscenity which is outside the protection of the First Amendment, adopted a Fifth Amendment fair notice rule. It has long been an established rule of Due Process that no person may be subject to criminal prosecution without "fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612, 617 (1954); see also *Bouie v. City of Columbia,* 378 U.S. 347, 350-51 (1964); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939).

Miller states "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

It is clear that the California statute on its face does not meet the sound test of *Miller,* since it does not specifically define the sexual activity which is prohibited. As it reads, there is no fair notice what California permits or prohibits.

There is dispute among law enforcement officials whether the legislature of California could ever draft a statute which meets the test. The County Counsel for

the County of Los Angeles in another case pending before this court has stated:

> "The argument of the plaintiff requiring specifically enumerated sexual activity in order to make the obscenity statutes constitutional, must fail because legislatures can't be expected to enumerate and define every possible activity about a perversion known to humans regarding sexual activity. Under the maxim of expression unius est exclusio alterius, plaintiffs' argument would allow certain obscene sexual conduct to be exhibited if it was inadvertently omitted by the Legislation." (*Monica Theater, Inc., et al. v. Evelle J. Younger, et al.,* Case Number 70-2167-ALS. Defendant's Brief, filed November 30, 1973 at p. 2.)

The Court in *Miller* recognized the concern expressed here by Los Angeles' Deputy County Counsel when it stated "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'" 413 U.S. at 27, n. 10.

The California Court of Appeal in *Enskat* impliedly conceded that the statute as written does not meet *Miller.* It stated, however, that the statute has been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. (At least one federal court has declined to consider the validity of a state obscenity statute solely on the basis of past state cases without the benefit of a post-*Miller* state court analysis. *United Artists Corp. v. Harris,* 363 F. Supp. 857 (W.D. Okla. 1973).) Given the particularities that the California statute is missing on its face, it may be that such an undertaking would go beyond

the pale of judicial construction and cross over into the realm of legislative drafting. For the moment, however, this court need only address itself to the judicial construction put forth in *Enskat*.

In reaching their conclusion the state court cited *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 (1968); *People v. Noroff*, 67 Cal. 2d 791 (1967); *People v. Cimber*, 271 Cal. App. 2d Supp. 867 (1969); and *Landau v. Fording*, 245 Cal. App. 2d 820 (1966). While reference was made in at least two of those cases to sexual acts there involved, none of the state court opinions attempted to delineate standards of obscenity based on specific conduct.

The analysis of those cases that emerges in *Enskat* is that: (1) only "hard core pornography" is prohibited; (2) nudity, absent a sexual activity is not obscene; and (3) the material must contain a "graphic description of sexual activity." It is clear that the "fair notice" test of *Miller* is not met.

The term "hard core pornography" is no more precise than the term "obscenity." *Jacobellis v. Ohio*, 378 U.S. 184 at 201 (1964).

Likewise the mere language "graphic description of sexual activity" does not meet the specificity test. The Court stated "as a result, we now confine the permissible scope of such regulation to words which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law*, as written or authoritatively construed." *Miller* at 24 (emphasis added). In order to comport with due process, the criminal obscenity statute here must give fair notice of what conduct is criminally proscribed, *United States v. Harriss, supra*, and the Supreme Court in *Miller*, by outlining its criteria for "obscenity", has authoritatively indicated what a statute, in its language or its judicial construction, must have to be constitutional. *Enskat* and the cases cited therein have not supplied a description of specific sexual conduct "as definitely as if it had been so amended by the legislature", *Winters v. New York*, 333 U.S. 507, 514 (1948). *Cf. Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952).

In addition to those cases cited by the Court of Appeal in *Enskat*, *People v. Sarong Gals*, 27 Cal. App. 3d 46 (1972); *People v. Adler*, 25 Cal. App. 3d Supp. 24 (1972) and *Dixon v. Municipal Court*, 267 Cal. App. 2d 789 (1968) have been brought to the court's attention as bearing on the construction of § 311. *Sarong Gals* involved a civil suit, an in rem action brought under the Red Light Abatement Act, California Penal Code §§ 11225-11235, and the construction of the statutory term "lewdness'; that case is inapplicable to the issues here. *Dixon* involved the lifting of a writ of prohibition and a remand to the municipal court, holding that the fact that there may have been "simulation" of sexual acts did not bar a finding of obscenity as a matter of law. As the Court there noted, however: ". . . [in] the case before us, we do not have testimony of what was actually done, because prosecution was barred by the writ." 267 Cal. App. 2d at 793. *Adler*, like some of the cases cited in *Enskat*, makes a passing and somewhat vague reference to sexual acts described in the book that was the subject of the action. As with all the cases referred to, however, there is no attempt by the courts of the State of California to formulate a standard of obscenity or a rule of law based upon those specific acts therein mentioned, or upon *any* specific acts.

The California Court of Appeal, in deciding *Enskat*, also noted that the statute as presently written imposed "more strict requirements on the prosecution as to the definition of obscenity", because it retains the "utterly without redeeming social value" or *Memoirs* test which the Supreme Court disavowed in *Miller*. The California Court of Appeal correctly noted that imposing more strict standards on the government than are required by the Constitution would not make a statute unconstitutional. From that proposition, however, the state court then derived a decision of questionable logic: since the Supreme Court obviously intended to make it "easier" to prosecute obscenity cases after *Miller*, and since it is harder to meet the California standard of "*utterly* without redeeming social value" than it is to meet the new test of "lacks serious literary, artistic, political, or scientific value", then the state is not bound to "require increased specificity" in the law. *Enskat* at 911. This "trade-off" argument is particularly specious. First, the social value test is only one portion of the overall standard developed by the Supreme Court; isolating one portion of the test cannot cure the defects of the whole test. (It is clear that there can be "sexual activity" which is utterly without redeeming value which is so innocuous as to not be included on a list enumerated by a legislature.) Secondly, the zealous inquiry into the "intent" of the Supreme Court reveals nothing that would justify the contention that it is now supposed to be "easier" to convict purveyors of sexually-oriented materials. The Court in *Miller* set forth important First and Fifth Amendment principles central to a fair and reasoned system of criminal law, and not a statement of disapproval of works with a sexual theme.

Finally, it has been suggested that footnote 7 in *United States v. 12 200-foot Reels of Film*, 413 U.S. 123 (1973) permits the type of construction urged upon the court today. If the Supreme Court by that passing reference was announcing new boundaries for the legislative and judicial domains, it is clear that it at best applies only to the particular power the Supreme Court has to construe federal statutes. Without more, that narrow statement can be of no relevance to this determination. For the example of another court unwilling to construe this footnote as an invitation to repose legislative power in the judiciary, see the opinion of the Louisiana Supreme Court in *Louisiana v. Shreveport News Agency, Inc.*, 42 U.S.L.W. 2344 (Jan. 8, 1974).

In summary, we find (1) the California obscenity statute as written does not meet the specificity test of *Miller* and (2) the California courts, in interpreting the statute may have liberalized it beyond its wording but have not specifically construed it so as to give fair notice as to what is constitutionally prohibited.[2]

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[2]This finding comports with the following decisions which have held the statutes in other states not to comply with the mandate of *Miller:*

New Jersey
Hamar Theaters, Inc. v. Cryan, 13 Cr.L. 2449, United States District Court for the District of New Jersey (July 26, 1973).

Massachusetts
Commonwealth v. Horton, Commonwealth v. Capri Enterprises, Inc., and *Essex Theatre Corp. v. Police Commissioner of Boston*, Massachusetts Supreme Judicial Court (April 23, 1974).

Louisiana
Louisiana v. Shreveport News Agency, Inc., 42 U.S.L.W. 2344, Louisiana Supreme Court (January 8, 1974).

Iowa
State v. Cahill and Wedelstadt (No. IM2-261), District Court, Linn County, Iowa (August 13, 1973).

(This footnote is continued on next page)

Injunctive Relief

In addition to the prayer for declaratory relief regarding the constitutionality of the statute, plaintiffs seek injunctive relief requiring the return of their seized property. In *Steffel* the Court held that requests for injunctive and declaratory relief must not be treated as a single issue.

Since there are no allegations that criminal prosecutions are pending or threatened, plaintiffs have not asked this court to stay any state criminal actions. It was that sort of injunctive relief with which the Supreme Court was faced when formulating rules of abstention in *Younger v. Harris, supra, Samuels v. Mackell, supra,* and *Perez v. Ledesma,* 401 U.S. 82 (1971).

Plaintiffs here merely seek the return of their seized property. Although equitable in nature, that relief is markedly different from an order which would force a state criminal court to stay its proceedings. While requiring the state to return four copies of the film and approximately $5,000 in gate receipts might have some disruptive influence on a possible future prosecution, or upon prosecutions of others, it is less harsh an interference than a direct injunction against a state proceeding. Nevertheless, for purposes of this analysis, this court will treat this prayer for injunctive relief as any other.

Cases of this sort can often involve dual requests for both injunctive and declaratory relief. See, for example, *Perez v. Ledesma, supra* (separate opinion of Brennan, J.). *Younger v. Harris* addressed itself solely to a rule

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North Carolina
State v. Bracken (72 CR 26502) and *State v. Cox* (72 CR 26503), Superior Court in Greensboro, North Carolina.
Indiana
Stroud v. Indiana (570 S 107) and *Mohney v. Indiana* (471 S 94), Supreme Court of Indiana (August 21, 1973).

for injunctive relief when a prosecution was pending. In *Samuels v. Mackell,* plaintiffs sought declaratory relief when a prosecution was similarly pending. The recent case of *Steffel v. Thompson, supra,* formulated standards for declaratory relief when no prosecution was pending, but specifically declined to rule on whether injunctive relief is appropriate in such an instance. *Id.* at 10. This court is now faced with that situation in which the Supreme Court has yet to act.

The perimeters of such a rule of law are still unclear; whether the strict doctrine of *Younger* would apply or not when there is no pending prosecution has been seriously questioned. See Note, Implications of the *Younger* Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending, 72 Colum. L. Rev. 874 (1972) at 895 and cases collected therein. At least one court has indicated that federal relief is more appropriate when, as here, the state statute is attacked on its face. *Jones v. Wade,* 479 F.2d 1176 (5th Cir. 1973) (Wisdom, J.).

Those questions, however, are of only minor importance to this court, since all the elements necessary for injunctive relief under *Younger* are present here. First, the question of whether these plaintiffs have standing and present a justiciable controversy has already been discussed. This court need only reiterate that defendants are now holding a significant amount of money in which plaintiffs claim a present property right. Second, the posture of § 311 as construed by the California courts is such that it is unlikely the injury could be remedied by a defense in a criminal prosecution. The admonition of abstention in *Younger v. Harris* must be viewed in light of the fact that the statute involved there (the California Syndicalism Act) had never been reviewed by the state courts since the Su-

preme Court had overruled *Whitney v. California,* 274 U.S. 357 (1927) by its decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). A defendant then faced with a prosecution for violating that Act could have set up a defense based upon the unconstitutionality of the statute.

By way of contrast, the California obscenity decision has been finally reviewed in the light of *United States v. Miller*. The construction of § 311 rendered in *Enskat* has effectively foreclosed relief in the state courts.

Finally, the objective facts set forth in the first part of this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effective exorcise the movie "Deep Throat" out of Buena Park.

The gravamen of the defendants' justification is, of course, that the property is contraband, both the evidence and the fruit of an illegal activity. Such a justification, however, dissipates in the face of a declaration by this court that the statute is invalid.

Pursuant to the provisions of Rule 52(a) this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to the provisions of Rule 58 a separate judgment shall be prepared and entered which shall provide as follows:

1. The California obscenity statute, Penal Code Sections 311 *et seq.*, are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California,* 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED: June 4, 1974.

/s /Walter Ely
WALTER ELY
United States Circuit Judge
/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Separate Judgment Pursuant to Rule 58 of the Federal Rules of Civil Procedure.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: June 4, 1974.

Before: Honorable Walter Ely, Circuit Judge, Honorable William C. East, and Honorable Warren J. Ferguson, District Judges.

The court having heretofore issued its memorandum opinion, said opinion constituting its findings of fact and conclusions of law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure,

IT IS DECREED as follows:

1. The California Obscenity Statute, Penal Code Sections 311 *et seq.*, are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California*, 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED this 4th day of June, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge
/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX B.

Order.

United States District Court, Central District of California.

Vincent Miranda, etc., et al., Plaintiffs, vs. Cecil erties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, vs. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. No. 73-2775-LTL.

Filed: Dec. 28, 1973.

This matter is before the Court on the application of plaintiff corporation, who operates a motion picture theatre known as the Pussycat Theatre in Buena Park, California, and plaintiff Miranda, who owns the land on which the theatre is located, for a temporary restraining order. The temporary restraining order seeks to require defendants Cecil Hicks, District Attorney of the County of Orange, State of California, Oretta Sears, Deputy District Attorney of the same County, Dudley D. Gourley, Chief of Police of the City of Buena Park and City of Buena Park Police Officers Arthur Fontecchio, Richard Hafdahl and Daniel Harrison to return three of four prints of the film "Deep Throat" seized

by certain of the defendants from plaintiff corporation's theatre, to enjoin further seizures of additional prints that plaintiff corporation may show at its theatre and to return certain cash impounded at the time of the seizure of the above-noted prints pending hearing on a requested order to show cause seeking similar relief on a more permanent basis and the convening of a three-judge court pursuant to 28 U.S.C. Sections 2281 and 2284 to hear the claims raised in plaintiffs' complaint.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1343(3) and (4) and 42 U.S.C. Section 1983.

The record before us shows that on November 23 and 24, 1973 law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code Sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.

Thereafter on November 26, 1973 defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973 at which these plaintiffs and others appeared

by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff corporation's theatre seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.

In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required. The temporary restraining order sought by plaintiffs is denied.

The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. Section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification and certification in accordance with 28 U.S.C. Sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

The Clerk of this Court will serve a copy of this Order by United States mail on counsel of record for the parties.

DATED: December 28, 1973.

/s/ Lawrence T. Lydick
Lawrence T. Lydick
United States District Judge

APPENDIX C.

Order to Show Cause and Temporary Restraining Order.

United States District Court, Central District of California.

Vincent Miranda, etc., et al., Plaintiffs, vs. Cecil Hicks, etc., et al., Defendants. Civil No. 73-2775-F.

The Court, having read and considered the Application for a Temporary Restraining Order and Order to Show Cause for a civil contempt, and the Affidavit of DAVID M. BROWN in support thereof, and

It appearing that Defendants, having been duly served with the judgment of this Court entered on June 4, 1974, have failed and refused to return to Plaintiffs four copies of the motion picture film "Deep Throat," as ordered by this Court in its said judgment of June 4, 1974, and no stay of said Order having been obtained by Defendants; and

It appearing that Defendants have seized or caused to be seized 7 additional complete prints of the said film "Deep Throat" from Plaintiffs' theatre subsequent to July 29, 1974, and have seized 3 complete prints of the film "Devil In Miss Jones" from Plaintiffs' theatre subsequent to July 29, 1974; and

It appearing that the aforesaid conduct is in violation of the judgment entered in this action on June 4, 1974, and that the said additional seizures are calculated to prevent the exhibition to the public by Plaintiffs of the aforesaid motion picture films, contrary to

the provisions of the First and Fourteenth Amendments to the United States Constitution; and

It appearing that the aforesaid conduct of the Defendants was undertaken in bad faith and for the purpose of harassment, and is causing Plaintiffs great and immediate irreparable injury; and

It appearing that Defendants, through their counsel, have been notified on Plaintiffs' intention to apply for a Temporary Restraining Order; and

It appearing from all of the foregoing, and from all the files and records in this action, that this is a proper case in which to issue a Temporary Restraining Order;

IT IS HEREBY ORDERED that Defendants, CECIL HICKS, ORETTA SEARS, DUDLEY D. GOURLEY, ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, show cause before this Court, located at 312 North Spring Street, Los Angeles, California, in the Courtroom of the Honorable WARREN J. FERGUSON, on August 12, 1974, at 10 A.M., or as soon thereafter as counsel may be heard, why:

1. A Preliminary Injunction should not issue, requiring Defendants, their agenst and employees, and all other persons in active concert and participation with the Defendants, to deliver forthwith to Plaintiffs all prints of the motion picture films "Deep Throat" and "Devil In Miss Jones" which have been seized by said Defendants from Plaintiffs' motion picture theatre in the City of Buena Park, California subsequent to July 29, 1974;

2. A Preliminary Injunction should not issue restraining Defendants, their agents and employees, and all persons in active concert and participation with them, from seizing any additional copies of the said films from Plaintiffs' theatre, and from commencing or carrying on any criminal prosecutions against Plaintiffs or their employees pursuant to California Penal Code §§311, *et seq.;*

3. Defendants, and each of them, should not be found in contempt of this Court for failing and refusing to return to Plaintiffs four previously seized copies of the said motion picture film "Deep Throat," which this Court ordered said Defendants to return to Plaintiffs by judgment entered on June 4, 1974;

4. Defendants should not be required to pay damages to Plaintiffs for such contempt;

IT IS FURTHER ORDERED that, pending hearing on the Order to Show Cause, or further order of this Court, the said Defendants, and their agents and employees, and all persons in active concert or participation with them,

1. Deliver forthwith to Plaintiffs all prints of the motion picture films "Deep Throat" and "Devil In Miss Jones" which have been seized by said Defendants from Plaintiffs' motion picture theatre in the City of Buena Park, California subsequent to July 29,1974; and

2. Are enjoined from seizing any additional copies of the films "Deep Throat" and "Devil In Miss Jones" from Plaintiffs theatre in Buena Park, Calif.

3. Are enjoined from commencing or carrying on any criminal prosecutions against Plaintiffs, or their employees, pursuant to California Penal Code §§311, *et seq.;* and

IT IS FURTHER ORDERED that a copy of this Order to Show Cause and Temporary Restraining Order, together with the Application for a Temporary Restraining Order and Order to Show Cause, and supporting Affidavit, be served on the said Defendants on or before the hour of 2 P.M., on the 5th day of August, 1974.

DATED: August 3, 1974.

/s/ Warren J. Ferguson
UNITED STATES DISTRICT JUDGE

APPENDIX D.

Entered in the Register of Actions on July 26, 1974; W. E. St. John, County Clerk, by H. J. Gallagher, Deputy.

Filed: July 26, 1974.

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Appellant, vs. Edward Lee Bailey, James Samuel Lytell, Walnut Properties, Inc., Vincent Miranda, John Doe I and John Doe II, Defendants and Respondents. No. AP-1594.

On Appeal from the Municipal Court of the North Orange County Judicial District, Hon. Max Eliason, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the order to suppress pursuant to Penal Code Section 1538.5 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby reversed, *Aday v. Superior Court* (1961), 55 Cal. 2d 789. The requisite prompt adversary determination of obscenity under *Heller v. New York* (1973), 93 S.Ct. 2789, has been held. *Furthermore, for purposes of the 1538.5 and 1539-40 Penal Code* motion, defendants have not urged non-obscenity of the film.

The cause is remanded to the Municipal Court for further proceedings.

Dated this 26th day of July, 1974.

/s/ Kneeland
KNEELAND
Judge

/s/ Judge illegible
JUDGE

/s/ Lee
LEE
Presiding Judge

[Seal]

APPENDIX E.

§ *311.* [*Definitions.*] As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its

prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance. [1961 ch 2147 § 5; 1969 ch 249 § 1; 1970 ch 1072 § 1; former § 311 repealed 1961 ch 2147.] *3 Cal Jur 3d Amusements and Exhibitions § 11, 13; Cal Jur 2d Cl & D § 6, Decl R §9, False Imp § 10, Grand J § 23, Lewd §§ 2-5; Witkin Crimes pp 500, 501, 503, 504, 505.*

§ *311.2* [*Sale or distribution, etc., of obscene matter.*] (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed. [1961 ch 2147 § 5; 1968 ch 399 § 1; 1969 ch 249 § 2.] *3 Cal Jur 3d Amusements and Exhibitions § 13; Cal Jur 2d Lewd §§ 2, 4; Witkin Crimes pp 503, 504; Evidence 2d, 1972 Supp p. 118.*

§ *1526.* [*Examination by magistrate of complaints, etc.: Affidavit: Subscription.*] (a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing,

and cause same to be subscribed by the party or parties making same.

(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court. [1872; 1957 ch 1882 § 1; 1970 ch 809 § 1; 1972 ch 662 § 1.] *Cal Jur 2d Search § 14; Witkin Evidence p 132.*

§ *1536.* [*Retention of property taken.*] All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable. [1872; 1903 ch 73 § 1; 1957 ch 1885 § 2.] *Cal Jur 2d Search §§ 16, 19; Witkin Evidence p 134.*

§ *1539.* [*Taking of Testimony: Transcripts.*] (a) If a special hearing be held in the superior court pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against him; or (iii) by a person who is

not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe his shorthand notes pursuant to this section if any party to a special hearing in the superior court files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the county clerk shall deliver the original of such transcript so filed with him to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand by him without cost to him. [1872; 1967 ch 1537 § 2.] *Cal Jur 2d Search §§ 15 et seq., 56, 60; Witkin Evidence pp 63, 134, 135, 136.*

§ *1540. Property, when to be restored to person from whom it was taken.* If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken. [1872.] *Cal Jur 2d Search §§ 15 et seq., 56, 60; Witkin Evidence pp 63, 65, 134, 135.*

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS,

Appellant,

vs.

VINCENT MIRANDA,

Appellee.

Appeal From the United States District Court for the Central District of California.

APPEAL DOCKETED AUGUST 22, 1974.
JURISDICTION POSTPONED NOVEMBER 18, 1974.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

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Appeal From the United States District Court for the Central District of California.

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November 29, 1973—Plaintiffs-Appellees complaint for damages, declaratory relief and injunction in the case of Miranda et al v. Hicks et al, No. 73-2775, filed in United States District Court, California Central District, Los Angeles, California.

November 29, 1973—Affidavits of Carl Schmidt, Richard W. Witte, Edward Bailey, Donna Stockdale, Donald J. Haley and David M. Brown filed by Plaintiffs-Appellees in support of application for temporary restraining order and order to show cause.

November 29, 1973—Order to reassign case filed by Judge Warren J. Ferguson.

December 3, 1973—Minute Order by Judge Lydick.

December 3, 1973—Affidavits of John H. Smith Jr., (Judge of the Orange County Municipal Court), Arthur Fontecchio, Thomas R. Hafdahl, Daniel Harrison, John F. Anderson, and Oretta D. Sears and certified copies of search warrants, affidavits and returns filed by defendants-appellants in opposition to application for temporary restraining order and order to show cause.

December 3, 1973—Hearing before Judge Lawrence T. Lydick on order to show cause.

December 28, 1973—Notification and certificate requesting that a three judge court be convened filed by Judge Lawrence T. Lydick.

December 28, 1973—Order denying temporary restraining order and finding that defendants-appeliants acted lawfully and pursuant to lawful orders of the state court filed by United States District Judge Lawrence T. Lydick.

January 14, 1974—Summons and complaint in the case of *Miranda et al v. Hicks et al* No. 73-2775 officially served on defendants-appellants.

January 29, 1974—Answer to complaint for declaratory judgment damages and injunction filed by defendants-appellants.

January 29, 1974—Affidavits of Orange County Municipal Court Judge John H. Smith Jr., Arthur Fontecchio, Thomas R. Hafdahl, Daniel Harrison, John F. Anderson, Cecil Hicks and Oretta D. Sears were filed by defendants-appellants in support of the answer to the complaint.

January 29, 1974—Certified copies of the state search warrants, affidavits in support and returns thereof, certified copies of order to show cause, temporary restraining order and order shortening time issued by Orange County Superior Court on November 27, 1973, application for the above order to show cause, certified copy of reporter's transcript of hearing on order to show cause and certified copy of "order of seizure after adversary hearing", were filed by defendants-appellants in support of their answer.

January 30, 1973—Notice of motion and motion to dismiss complaint requesting hearing date of March 4, 1974 before United States District Court Judge Lawrence T. Lydick filed by defendants-appellants.

February 4, 1974—Minute order entered by United States District Court Judge Ferguson on the court's own motion transferring the hearing from Judge Lydick's courtroom to his own courtroom.

February 8, 1974—Letter of Kim Schwidgalt, deputy clerk to Judge Lydick informing the parties that by order of the Ninth Circuit District Judge (dated

January 8th 1974) the Honorables Ely, Ferguson and East had been appointed to hear the matter pursuant to §2284 title 28 and that henceforth all filings should be directed to those judges.

February 8, 1974—Notice of motion and motion to dismiss claim for damages without prejudice and for preliminary injunction filed by plaintiffs-appellees.

February 15, 1974—Notice of motion and motion to dismiss complaint and for summary judgment with proposed findings of fact, conclusions of law and order filed by defendants-appellants.

February 25, 1974—Affidavit of David M. Brown in support of motion for preliminary injunction filed by plaintiffs-appellees.

February 25, 1974—Reporter's transcript of the proceedings had in Orange County Municipal Court filed by plaintiffs-appellees.

February 28, 1974—Affidavit of C. Brent Swanson in support of defendants-appellants motion to dismiss filed by defendants-appellants.

March 4, 1974—Hearing on defendants-appellants motion to dismiss and for summary judgment, plaintiffs-appellees motion to dismiss claim for damages without prejudice and plaintiffs-respondents motion for preliminary injunction argued in United States District Court before Judge Ferguson.

March 7, 1974—Order granting plaintiffs-appellees motion to dismiss and denying defendants-appellants motion to dismiss entered by Judge Ferguson.

March 20, 1974—Notice of pendency of the action to Attorney General of California filed by three-judge court.

March 20, 1974—Order ordering issue of harassment submitted on the merits and asking for briefing on constitutionality of Penal Code Section 311.2 filed by three judge court.

April 4, 1974—Memorandum regarding defendants' harassment filed by plaintiffs-appellees.

April 15, 1974—Response filed by defendants-appellants Hicks and Sears.

April 22, 1974—Response filed by defendants-appellants Gourley, Fontecchio, Hafdahl and Harrison.

June 4, 1974—Opinion and judgment of three-judge court entered finding defendants-appellants guilty of harassment, declaring the California statute to be unconstitutional and ordering the return of all copies seized.

June 14, 1974—Notice that on July 1, 1974 a motion for rehearing and for relief from judgment and to amend and alter judgment would be filed by defendants-appellants Gourley, Fontecchio, Hafdahl and Harrison was filed by defendants-appellants.

June 14, 1974—Notice that on July 1, 1974 defendants-appellants Hicks and Sears would move the court for relief from judgment pursuant to Rules 60(b) and 62 of the Federal Rules of Civil Procedure was filed by defendants-appellants Hicks and Sears.

June 14, 1974—Points and authorities in support of motion for relief from judgment, certified copy of docket and complaint of the Orange County criminal case, and affidavits of Orange County Municipal Court Judge John H. Smith, Jr., of Thomas R. Hafdahl and of Brent Swanson filed by defendants-appellants Cecil Hicks and Oretta Sears.

June 24, 1974—Order declaring motions submitted filed by the court.

July 5, 1974—Notice of appeal.

August 3, 1974—Order to show cause in re contempt and temporary restraining order issued.

August 12, 1974—Hearing on order to show cause before Judge Ferguson.

September 30, 1974—Supplemental opinion filed and amended judgment entered substantially reaffirming prior decision.

Complaint for Damages, Declaratory Relief and Injunction, Pursuant to the Civil Rights Act [42 U.S.C. 1983].

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, vs. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta D. Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775 F.

Filed November 29, 1973—Served January 14, 1974 [R. pp. 1-9].

I

The jurisdiction of this Court is invoked under Title 28 U.S.C 1343 (3) and (4) and 42 U.S.C. 1983, this being an action:

A. To redress the deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs by the Constitution of the United States, particularly the First, Fourth and Fourteenth Amendments thereto; and

B. To recover damages and to secure equitable and other relief under an act of Congress, providing for the protection of civil rights.

II

The jurisdiction of this Court is also invoked under 28 U.S.C. 1331, this being an action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000.00, and arises under the Constitution and laws of the United States, and particularly the First, Fourth and Fourteenth Amendments to the United States Constitution.

III

This is also a case where the Plaintiffs are seeking a declaration of their rights under the Constitution and the laws of the United States and under 28 U.S.C. 2201 and 2202. This Court, in a case of actual controversy within its jurisdiction, may declare the right of Plaintiffs seeking such declaration.

IV

This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of state statutes by restraining the officers of said State in the enforcement and execution of said statutes, upon the ground that the said statutes, on their face, and as construed and applied to Plaintiffs, violate the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution and, therefore, pursuant to 28 U.S.C. 2281 and 2284, the application for such injunctive relief should be heard and determined by a District Court of three judges.

V

Plaintiff VINCENT MIRANDA, doing business as WALNUT PROPERTIES (hereinafter referred to as "MIRANDA") is the owner of the land located at 6177 Beach Boulevard, City of Buena Park, County of Orange, State of California. Plaintiff PUSSYCAT

THEATRE HOLLYWOOD (hereinafter referred to as the "Theatre") is a California corporation, duly organized and existing under the laws of the State of California. The Theatre is engaged in the business of operating a motion picture theatre known as the Pussycat Theatre, Buena Park, located at 6177 Beach Boulevard, City of Buena Park, County of Orange, State of California.

VI

Defendant CECIL HICKS is the District Attorney for the County of Orange, State of California; Defendant ORETTA SEARS is a Deputy District Attorney of the County of Orange, State of California; Defendant DUDLEY D. GOURLEY is the Chief of Police of the City of Buena Park, County of Orange, State of California; Defendants ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON are Officers of the Police Department of the City of Buena Park, County of Orange, State of California.

VII

The acts and practices of the Defendants, their agents, servants and employees, as hereinafter alleged, were performed under color of law and therefore constituted acts of the State within the meaning of 42 U.S.C. 1983 and the Fourteenth Amendment to the United States Constitution.

VIII

Prior to November 23, 1973, the motion picture film entitled "Deep Throat" was widely exhibited throughout the United States in motion picture theatres to adult audiences, and has gained a nationwide reputation and critical acclaim, and possesses serious, artistic, political, scientific, educational, and other values. The said film

is not obscene nor otherwise unlawful but, on the contrary, is expression entitled to the protection of the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

IX

On November 23, 1973, the Theatre commenced exhibiting the said film at the Pussycat Theatre, Buena Park. After the completion of the first exhibition of the said film at the said Theatre, Defendants FONTECCHIO, HAFDAHL and HARRISON seized the print of the film which had just been exhibited at the Theatre. In addition to seizing a print of the film, said Defendants seized cash in the amount of $305.00, which represented all of the monies in the cash drawer of the Theatre. The seizure occurred at approximately 1:35 p.m.

X

On November 23, 1973, at approximately 4:37 p.m., Defendants FONTECCHIO, HAFDAHL and HARRISON seized a second complete print of the film "Deep Throat", which was then being exhibited at the theatre. At the same time, the said Defendants seized from the Theatre's cash drawer the sum of $159.00.

XI

On November 23, 1973, at approximately 11:45 p.m., Defendants FONTECCHIO, HAFDAHL and HARRISON seized a third and complete print of the film "Deep Throat" from the Theatre. Said Defendants also brought a locksmith to the Theatre who, at said Defendants' direction, opened the Theatre's safe, whereupon cash in the sum of $4,082.33 was seized from the safe by said Defendants.

XII

The next day, Saturday, November 24, 1973, the Theatre began its first exhibition of the film "Deep Throat" at approximately 12:33 p.m. At approximately 5:55 p.m., Defendants FONTECCHIO, HAFDAHL and HARRISON seized a fourth complete print of the film "Deep Throat" from the theatre, and also seized all cash present in the sum of $197.18, which included receipts from the sale of concessions. After the said seizure of the fourth print of the film, the Theatre was closed to the public, thereby cancelling all scheduled performances for the remainder of the day. The Theatre remained closed to the public all day Sunday, November 25, 1973, and through the afternoon of Monday, November 26, 1973.

XIII

As a result of the seizure of the four prints of the film "Deep Throat" from the Theatre, the Theatre was rendered unable to continue exhibition of the said film, as previously scheduled and advertised to the public. During the seizure of one of the prints of the film, Defendant HARRISON stated that every print of the film "Deep Throat" which might be exhibited at the Theatre would be seized "because this is Orange County."

XIV

The conduct of Defendants FONTECCHIO, HAFDAHL and HARRISON, described above, was undertaken at the direction of Defendants GOURLEY, HICKS and SEARS.

XV

On November 27, 1973, after the Theatre had already been prevented from further exhibition of the film "Deep Throat" due to the four seizures described

above, Defendants HICKS, SEARS, GOURLEY and FONTECCHIO sought and obtained from a Judge of the Superior Court for the County of Orange, State of California, a Temporary Restraining Order preventing the Theatre from exhibiting the film "Deep Throat" pending a hearing on an Order to Show Cause why all copies of the film should not be seized as "contraband."

XVI

On November 28, 1973, the said Defendants sought and obtained from the said Judge of the Superior Court, an order to seize all copies of the film "Deep Throat" presently located at the Theatre and, in addition, to seize any copies of the said film which may be delivered or found at the Theatre on any future date.

XVII

The acts and practices of the Defendants complained of herein were initiated and conducted in bad faith and for the purpose of harassment. The multiple seizures of prints of the same film and the Defendants' conduct in obtaining an order for seizure of all prints of the film that may be found at the Theatre in the future, were not undertaken for bona fide purposes of law enforcement, since, as the Defendants, and each of them, well knew, only one print of the film was necessary for use as evidence in any contemplated state criminal prosecution. On the contrary, the aforesaid conduct of the Defendants, and their conduct in seizing all cash present at the Theatre, was undertaken solely to prevent the Theatre from exhibiting the film "Deep Throat" to the public prior to any final judicial determination of its alleged obscenity, in knowing and intentional violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution.

The true intent and purpose of the conduct of the Defendants, and each of them, is to establish censorship and to interfere with Plaintiffs' lawful business of exhibiting motion picture films; to impose prior restraint upon the exercise by Plaintiffs of freedom of expression; to intentionally engage in unlawful searches and seizures for the purpose of harassing Plaintiffs and injuring them in their business; to deny to the public access to motion picture films protected by the First and Fourteenth Amendments to the United States Constitution; and to subject Plaintiffs to arbitrary, capricious and irrational deprivation of liberty and property without due process of law, all in violation of the guarantees of the First, Fourth and Fourteenth Amendments to the United States Constitution.

XVIII

The conduct of the Defendants, and each of them, violated Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution in the following respects:

A. The multiple seizures of identical prints of the same film operates as a prior restraint of freedom of expression before a final judicial determination on the issue of obscenity;

B. The procedures employed by Defendants in obtaining a purported Order for the seizure of all copies of the film that may be found at the Theatre now and in the future, lacked all of the procedural safeguards required by the United States Supreme Court to guard against the undue suppression of freedom of expression; and such procedures operate as a prior restraint on freedom of expression prior to any final judicial determination on the issue of obscenity;

C. The multiple seizures of identical prints of the same film and the purported Order for seizure of all prints of the film constituted unreasonable searches and seizures and deprived Plaintiffs of their liberty and property without due process of law;

D. The seizure of all cash present at the Theatre was an unreasonable search and seizure and deprived Plaintiffs of their property without due process of law.

XIX

The aforesaid conduct of the Defendants was allegedly undertaken pursuant to the provisions of the California obscenity statute, Penal Code §§311, 311.2 and 311.5. The said statutes, on their face and as construed and applied to Plaintiffs, are unconstitutional in the light of the decisions of the United States Supreme Court in *Miller v. California*, 93 S.Ct. 2607 and companion cases, decided June 21, 1973, in violation of the free speech and press and due process guarantees of the First and Fourteenth Amendments to the United States Constitution.

XX

Unless restrained by the Court, Defendants will continue to cause Plaintiffs great and immediate irreparable injury for which there is no adequate remedy at law.

XXI

By reason of the wrongful conduct of Defendants, and each of them, as aforesaid, Plaintiffs have suffered damages in an amount not less than $2,000,000.00.

XXII

The wrongful conduct of the Defendants, and each of them, was undertaken in bad faith and for the

purpose of suppressing the exercise of constitutional rights by Plaintiffs, entitling Plaintiffs to exemplary and punitive damages in the sum of $2,000,000.00.

AS AND FOR A SECOND DISTINCT CAUSE OF ACTION, PLAINTIFFS ALLEGE:

XXIII

Plaintiffs refer to and incorporate herein, as if fully set forth, the allegations contained in Paragraphs I through XIX, inclusive, of the First Cause of Action.

XXIV

There is a bona fide dispute between the parties as to whether the California obscenity statutes, California Penal Code §§311, 311.2 and 311.5, on their face and as construed and applied to Plaintiffs herein, are unconstitutional, in violation of the free speech and press, and due process provisions of the First and Fourteenth Amendments to the United States Constitution. Plaintiffs allege, and Defendants deny, that the said statutes, on their face and as construed and applied, are unconstitutional in the following respect:

In the light of the decisions of the United States Supreme Court in *Miller v. California,* 93 S.Ct. 2607, and companion cases, decided June 21, 1973, the said state statutes are vague, ambiguous and overbroad, and do not provide fair or adequate notice of what conduct is prohibited by the said statutes, all in violation of the First and Fourteenth Amendments to the United States Constitution.

* * *

WHEREFORE, Plaintiffs pray:

1. For a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction, requiring the Defendants to deliver forthwith to Plaintiffs all prints of the motion picture film "Deep Throat" which have been seized by Defendants, permitting said Defendants to make and retain a single copy of the said film, requiring Defendants to deliver forthwith to Plaintiffs all cash seized from Plaintiffs' Theatre, and restraining Defendants from any further seizures of copies of the said film from Plaintiffs' Theatre.

2. For a judgment declaring that California Penal Code §§311, 311.2, and 311.5, on their face, and as construed and applied to Plaintiffs, are unconstitutional, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution.

3. For general damages in an amount not less than $2,000,000.00.

4. For exemplary and punitive damages in the sum of $2,000,000.00.

5. For such other and further relief as to the Court seems just and proper.

* * *

Order to Reassign Case.

Filed November 29, 1973 [R. p. 11]

(Caption omitted in printing)

The undersigned Judge, to whom the above-entitled case was assigned pursuant to Local Rule 2, being of the opinion that he should not try said case, by reason of . . . the fact that I was the attorney who incorporated the City of Buena Park and was its City Attorney from 1953 until 1959 when I was appointed to the bench. I participated in meetings with the City Manager, City Council and the then Chief of Police with reference to the employment of the defendant Dudley D. Gourley as a police officer . . . hereby orders the case reassigned by the Clerk in accordance with Local Rule 2 or other applicable rule or order of this Court [28 U.S.C. §137]; and

IT IS FURTHER ORDERED that the Clerk serve copies of this Order forthwith by United States Mail on counsel for all parties appearing in this cause.
Dated: November 29, 1973

Warren J. Ferguson
United States District Judge

* * *

Affidavits in Support of Application for Temporary Restraining Order.

(a) Second Affidavit of David M. Brown in Support of Application for Temporary Restraining Order.

Filed November 29, 1973 [R. pp. 12-16]

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the firm of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional corporation, attorney of record for Plaintiffs herein.

2. Following the preparation and signing of my initial Affidavit filed concurrently herewith, new developments have occurred which now leave no room for doubt that Defendant District Attorney HICKS and the Buena Park Police Department will continue by unlawful means to suppress the exhibition of the film "Deep Throat" at Plaintiffs' theatre prior to any final judicial determination of its alleged obscenity.

3. On November 27, 1973, at approximately 12:00 P.M., Defendant Officer FONTECCHIO served an Order to Show Cause, Temporary Restraining Order and Order Shortening Time upon Plaintiffs' theatre. The Temporary Restraining Order purported to prevent the theatre from

> "showing, exhibiting, displaying or advertising the movie 'Deep Throat': and further refrain from removing the said film from 6177 Beach Boulevard, Buena Park, or in any way disposing of said copies of said film until after the conclusion of this Order to Show Cause hearing." (A copy of the Order and the Application in support thereof is attached hereto as Appendix "A").

4. The Order to Show Cause required persons alleged to be in charge of the theatre to appear before the Orange County Superior Court

> "to show cause why all copies of the above said film should not be ordered seized as contraband."

The Order further provided that the hearing on the Order to Show Cause may be set at any time prior to Friday, November 30, 1973, upon request of counsel, provided counsel for the People receive one hour notice and subject to the schedule of the Court.

5. Immediately upon learning of the Temporary Restraining Order and Order to Show Cause, I called the office of Defendant HICKS and stated that I would immediately seek a hearing before the Orange County Superior Court Judge who had issued the Order, the Honorable BYRON K. McMILLAN. A hearing was commenced before Judge McMillan at approximately 2:45 P.M., November 27, 1973.

6. Prior to appearing, I lodged with Judge McMillan's clerk a document entitled "Reservation of Federal Constitutional Questions," stating that

> "By appearing in the above-entitled action, Defendants [VINCENT MIRANDA, etc., et al.] do not waive but, on the contrary, specifically reserve all federal constitutional claims for purposes of federal jurisdiction." (A copy of the said document is attached hereto as Appendix "B").

7. I stated to the Court that I was appearing solely for the purpose of contesting the jurisdiction of the Orange County Superior Court to entertain the proceedings before it. I was then informed by Deputy District Attorney ORETTA D. SEARS, that no complaint, either civil or criminal, had been filed in the Orange County Superior Court, and that the document entitled "Application for Order to Show Cause and for a Temporary Restraining Order" filed in the Superior Court was not in connection with any pending matter, but rather constituted the equivalent of an application for a search warrant to seize *all copies* of the film "Deep Throat," and that the Temporary Restraining Order restraining exhibition of the film "Deep Throat" at Plaintiffs' theatre was issued under the "inherent power of the Superior Court."

8. As appears from the papers filed in the Orange County Superior Court, attached hereto as Appendix "A", Defendant HICKS cites no statutory or decisional authority for the bringing of such extraordinary proceedings, and indeed, there is none. There is no authority in California law giving jurisdiction to any California court to enjoin, temporarily or permanently, the exhibition of a motion picture film alleged to be obscene. The only authority is to the contrary. See *Harmer v. Tonylyn Productions,* 23 C.A. 3d 941, 100 Cal.Rptr. 576.

9. Nor is there any authority permitting application for a search warrant to seize all copies of an allegedly obscene film. The only legal question properly before a court asked to issue a search warrant for the seizure of alleged obscenity is whether or not there is *probable cause* to believe the matter obscene. California Penal Code §1525; ***Monica Theatre v. Municipal Court,*** 9 C.A. 3d 1, App., 88 Cal.Rptr. 71. The decision of the United States Supreme Court in ***Heller v. New York,*** 93 S.Ct. 2789, emphasizes again that the Constitution prohibits prior restraint of freedom of ex-

pression before a final judicial determination of obscenity. Such final judicial determination of obscenity cannot be had in a proceeding which is nothing more than an application for a search warrant, particularly where, as here, there is no action even pending in the Superior Court, either criminal or civil.

10. In addition to the utter lack of authority for the Superior Court proceedings initiated by Defendants, the said proceedings are grossly and flagrantly unconstitutional. At the time Defendants sought a Temporary Restraining Order preventing any exhibition of the film "Deep Throat" at Plaintiffs' theatre, and sought an Order to Show Cause why all copies of the film should not be seized, Defendants had already seized four complete prints of the film, thereby preventing its further exhibition at Plaintiffs' theatre. It is obvious, therefore, that the initiation of the Superior Court proceedings by Defendants was not for "the bona fide purpose of preserving [the film] as evidence in a criminal proceeding" (*Heller v. New York*, 93 S.Ct. at 2794), since Defendants already had seized four complete prints of the film—three more than the Constitution permits.

11. From all of the foregoing, it is plain that unless this Court issues a Temporary Restraining Order preventing further seizures of additional prints of the film "Deep Throat" from Plaintiffs' theatre, Defendants intend to and will continue seizing any and all prints of the film "Deep Throat" that Plaintiffs may be able to obtain in order to completely halt its exhibition in Orange County before there has been any final judicial determination that the film is or is not obscene.

* * *

(b) Affidavit of Edward Bailey [R. pp. 30-34].

Filed November 29, 1973

EDWARD BAILEY, being first duly sworn, deposes and says:

1. I am the manager of the Pussycat Theatre, Buena Park, located at 6177 Beach Boulevard, Buena Park, California.

2. On the 23rd of November, 1973, the film "DEEP THROAT" commenced a scheduled exhibition at the said theatre. On the said date, the theatre opened at 12 Noon and the film "DEEP THROAT" commenced showing at approximately 12:33 P.M.

3. Approximately 10 minutes after the commencement of the said exhibition and at about 12:55 P.M., on the said date, four members of the Buena Park Police Department's Vice Squad [Sgt. Richard Haufdal, Sgt. Arthur Fontecchio, Daniel Harrison and a Captain whose badge number is 315, but whose name I do not know] arrived at the theatre, gaining entrance without paying admission.

4. At the completion of the first showing of "DEEP THROAT", at or about 1:35 P.M., I observed the four police officers leave the theatre and observed them speaking to a person who I believe to be a Municipal Court judge. Shortly thereafter, the officers approached me and showed me a copy of a search warrant providing for the seizure of the following:

> "All reels of 35 MM film and canisters holding same, for the film entitled 'Deep Throat.' Items to be seized include, but are not limited to: all posters, signs, advertisements, or other writings which promote, advertise, etc., the viewing or contents of the above-described film. All documents,

papers, bills, receipts, business records, directives, memorandums, etc., tending to show what persons are responsible for the promotion, management, exhibition, or ordering of the above-described film."

A true and correct copy of the said search warrant is attached hereto as Appendix "A".

5. Purportedly acting under the said search warrant, Officer Fontecchio advised me that he was required under the search warrant to seize all monies in the cash drawer, and instructed me to turn over the said funds in the cash drawer. Pursuant to the instructions of the said officer, I delivered to him the sum of $305.00. Still purportedly acting under the said search warrant, the officer seized an assortment of documents and four reels of film which constituted the film "DEEP THROAT".

6. Being of the view that, under the rulings of the United States Supreme Court, the police were without authority to seize more than one print of the same film, the threatre exhibited a second print of the film "DEEP THROAT". The said exhibition commenced at about 2:15 p.m.

7. At or about 2:52 p.m., the same vice squad officers again entered the said theatre. At that time, Officer Fontecchio asked me if "DEEP THROAT" was playing. Upon my giving him an affirmative answer, he advised me that the officers would have to view the film again but that he wasn't sure whether or not they would confiscate the print then showing.

8. The officers remained at the theatre until approximately 3:30 p.m. Subsequently, at about 4:37 p.m., the vice squad officers returned and seized the print

of "DEEP THROAT" which was then being exhibited at the theatre. At the same time, the police seized from the cash drawer the sum of $159.00. After seizing the said $159.00, Officer Fontecchio asked me if there were additional funds in the safe on the premises. I answered in the affirmative. After seizing the said film and monies, the police left the premises at or about 4:55 p.m.

9. Prior to 7:15 p.m., the theatre obtained a third print of the film "DEEP THROAT" and commenced showing the said print, at or about 7:15 p.m. At about 7:30 p.m., the police officers arrived. Approximately 30 minutes thereafter, two of the police officers left, advising me that they were going to see if they could find a judge to obtain his signature on a search warrant. At about that time, one of the officers stationed himself in the box office, purportedly to see that no money was removed from the premises. Shortly thereafter, a uniformed police officer, Officer Provost, came to the theatre and sat in the box office to see that no money left the premises.

10. Prior to the time Officer Fontecchio left, he told me that the next time he returned he would probably have an order to seize all monies in the safe. He advised me that if I did not have a key to the safe when he returned, the officers would either have to force the safe open or obtain a locksmith to pick the lock.

11. At or about 9:10 p.m., Officers Haufdal and Harrison advised me that Officer Fontecchio was still looking for a judge to sign a search warrant.

12. At about 11:05 p.m., Officer Fontecchio came to theatre with a new search warrant, pursuant to

which he seized the third print of "DEEP THROAT". At that time, Officer Fontecchio advised me that he was going to seize all monies on the premises, including the monies in the box office, the cash register at the concession stand and the money in the safe. He asked me whether I had a key to the safe, and upon my reply that I did not, Officer Haufdal asked me if I knew the telephone number of the locksmith used by the company to change the locks or combination on the safe. I advised him of the name of the locksmith that we used and he advised me that he was going to call them to get the safe open. At about 11:45 p.m., the locksmith arrived and opened the safe. Officer Haufdal took the money out of the safe and placed it on the table, where it was counted. In all, the police seized the sum of $4,082.33.

13. The police officers left at approximately 12:30 a.m., taking with them, in addition to the money, the third print of "DEEP THROAT".

14. Following the third seizure of a print, as aforesaid, patrons at the theatre became very upset, demanding a refund. Upon being advised by the police that they (the police) had confiscated the money, they were told to line up at the box office where they would all be taken care of in due time. In all, the theatre issued approximately 400 refund passes to patrons who had been denied the opportunity of viewing the film they had paid to see. There were no further performances of the film on November 23, 1973.

15. On Saturday, November 24, 1973, the first exhibition of the film "DEEP THROAT" began at 12:33 p.m. Three vice officers [Haufdal, Harrison and Fontecchio] returned to the theatre at 4:15 p.m. and informed me that they were going to view the film. Officer Fontecchio left the theatre after the film had run, stating that he had to get a signature.

16. Officer Fontecchio returned at approximately 5:55 p.m., and he and the other two officers entered my office. Officer Fontecchio showed me a copy of another search warrant. Officer Fontecchio directed me to turn over to him all money on the premises, and I did so. The cash present totalled $197.18, and included receipts from the sale of concessions, such as soda pop, candy and popcorn. I told Officer Fontecchio that I needed $25.00 with which to open the theatre the next day. He stated that the search warrant did not allow him to differentiate among the monies on the premises and he therefore refused to permit me to retain $25.00.

17. Before leaving the theatre, Officer Fontecchio asked me if we were going to bring in another print of the film "DEEP THROAT". I stated that I didn't know. He then stated that he hoped the theatre did not bring in another print, because he wanted to stay home on Sunday and watch the football game. The officers left the theatre with the cash, two advertising posters, one schedule of performances and four reels containing a full copy of the film "DEEP THROAT".

18. After the officers left the theatre, the theatre was closed to the public, thereby cancelling the scheduled performances for the remainder of the day. Four such performances had been scheduled for that day.

19. The theatre remained closed to the public all day Sunday, November 25, 1973, and through the afternoon on Monday, November 26. Eight performances of the film had been scheduled for Sunday and three performances through Monday afternoon.

* * *

(c) Affidavit of Carl Schmidt.

Filed November 29. 1973 [R. p. 27]

CARL SCHMIDT, being first duly sworn, deposes and says:

1. I am the chief projectionist for the Pussycat Theatre, Buena Park.

2. On Friday, November 23, 1973, after I had projected the first showing of the film "DEEP THROAT", Vice Officer Harrison came into the projection booth and asked me to remove the film and give it to him. I complied.

3. Later that afternoon, during the second exhibition of the second print, Officer Harrison again entered the projection booth and demanded that I stop the showing and turn over to him the full print of the film. I did so. I asked Officer Harrison whether they were going to seize every print of the film "DEEP THROAT" that might be exhibited at the theatre. He replied,

> "Yes, we're going to seize every print because this is Orange County."

When I asked this question of Officer Harrison, I told him it was my understanding that the officers legally could seize only one print of any particular film.

4. I have inspected three of the four full prints of the film "DEEP THROAT" which were seized. As to the three full prints that I inspected, I know that all three were identical to one another.

* * *

(d) Affidavit of Richard W. Witte.

Filed November 29, 1973 [R. p. 28]

RICHARD W. WITTE, being first duly sworn, deposes and says:

1. In the course of my employment, I have examined all four complete prints of the film "Deep Throat" which were exhibited at the Pussycat Theatre in Buena Park on November 23 and 24, 1973. All of the four complete prints are identical.

* * *

(e) Affidavit of Donna Stockdale [R. p. 29].

Filed November 29, 1973

DONNA STOCKDALE, being first duly sworn, deposes and says:

1. I am a cashier at the Pussycat Theatre, Buena Park.

2. On Friday, November 23, 1973, and Saturday, November 24, I was on duty while all four prints of the film "DEEP THROAT" were seized. Following each seizure, it was my duty to explain to customers, many of whom were upset and angry, that the theatre could not refund their money which they had paid to see the film, because the police had confiscated all of the cash at the theatre. Virtually all of the many hundreds of people who entered the theatre on Friday and Saturday did demand their money back, and I had to give each of them the above explanation as to why I could not do so.

* * *

(f) Affidavit of David M. Brown [R. pp. 40-43].

Filed November 29, 1973

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the firm of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, attorney of record for Plaintiffs herein.

2. As appears from the accompanying Affidavits of EDWARD BAILEY, CARL SCHMIDT, DONNA STOCKDALE and DONALD J. HALEY, some of the Defendants in this action, specifically CECIL HICKS, District Attorney for Orange County and DUDLEY D. GOURLEY, Buena Park Chief of Police, and Buena Park Vice Officers FONTECCHIO, HAFDAHL and others, have commenced a campaign of harassment against Plaintiffs' theatre in Buena Park with the clear and announced objective of preventing the exhibition of the film "Deep Throat" at the theatre by seizing every print of the film the theatre has exhibited.

3. As appears from the aforesaid Affidavits, the film "Deep Throat" commenced exhibition to the public on Friday, November 23, 1973. Thereafter, on November 23 and 24, all four complete prints of the film exhibited at the theatre were seized in succession by officers of the Buena Park Police Department. The seizures were accompanied by the statement of Buena Park Police Officer HARRISON that "We're going to seize every print because this is Orange County."

4. The seizures of four prints of the same film in the space of two days has halted abruptly the exhibition of the film "Deep Throat" at Plaintiffs' theatre. In addition to seizing the four prints of the film, the officers seized all cash on hand at the theatre in the total sum of approximately $5,000.00, thereby preventing cash refunds to Plaintiffs' customers who had paid to see the film and were unable to do so because of the repeated seizures. Further, the officers seized a roll of film out of a camera being used by a publicist employed by Plaintiffs who was attempting to photograph some of the activities.

5. The conduct of the Defendants as revealed in the accompanying Affidavits is in clear violation of the First, Fourth and Fourteenth Amendments to the United States Constitution. In *Heller v. New York*, 93 S. Ct. 2789, the Supreme Court made it crystal clear that the Constitution prohibits "seizing films to destroy them or to block their distribution or exhibition" (93 S.Ct. at 2794). In *Heller*, the Court held that the First Amendment does not prohibit the seizure, pursuant to a search warrant issued *ex parte* and upon probable cause, of "a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where . . . there is no showing . . . that the seizure of the copy prevented continuing exhibition of the film." (93 S.Ct. at 2794-2795). But the Court emphasized that the State's power to seize a single copy of a film for use as evidence in a criminal proceeding is not a power to prevent the continuing exhibition of the film pending a final judicial determination of its alleged obscenity.

Indeed, the Court held that where seizure of even a *single* print of a film prevents its continued exhibition at a theatre, courts must permit the seized film to be copied and returned to its owner in order to avoid prior

restraint of expression. (93 S.Ct. at 2795). In short, the State's interest in preserving evidence for criminal prosecution permits nothing more than the seizure of a single print of any given film being exhibited at a theatre.

6. The attempt by the Defendants herein to use the power of search and seizure to halt the exhibition of the film "Deep Throat" before there has been a final judicial determination of its alleged obscenity, not only constitutes a forbidden prior restraint of freedom of expression, but constitutes bad faith law enforcement as well. These Defendants are well aware that multiple seizures of prints of the same film from a single theatre is unlawful. In *Miranda v. Bahner,* U.S.D.C. C.D. Cal. Civ. No. 73-195-HP, the Honorable DAVID W. WILLIAMS issued an Order on March 5, 1973, commanding these same Defendants to return to Plaintiffs one of two prints of a film entitled "Marital Aids and Stimulators" that Defendants had seized. A copy of the said Order is attached hereto as Appendix "A".

7. Accordingly, Plaintiffs seek a Temporary Restraining Order commanding Defendants to return to Plaintiffs forthwith, three complete prints of the film "Deep Throat", thereby permitting Defendants to retain one complete print of the film for possible evidentiary use. Such an Order would in no way halt, handicap, or hinder any possible state criminal prosecution. The Temporary Restraining Order requested would also enjoin the Defendants from seizing additional prints of the film "Deep Throat".

* * *

(g) Affidavit of Donald J. Haley [R. pp. 47-48].

Filed November 29, 1973

DONALD J. HALEY, being first duly sworn, deposes and says:

1. I am employed as a publicist for the Plaintiffs herein.

2. On Friday, November 23, 1973, at approximately 1:45 p.m., I was present on the sidewalk outside of the Pussycat Theatre, Buena Park.

3. At that time, I had a camera in my hand and was attempting to take photographs of a person that I believed to be a judge in the process of signing a document that I believed to be a search warrant. A vice officer for the City of Buena Park blocked my view with his back. I then moved to another position and another vice officer blocked my view and told me to "Get out of here." I then heard several voices speaking in rapid succession. One man stated, "Get that camera, dump the film." A vice officer then took my camera, handed it on someone else, and returned it to me a minute or so later.

4. I was then told that I had already violated the law and was subject to arrest (although, in fact, I was not arrested). I was then ordered to open the camera and to remove the film. I did so and handed it to a vice officer who gave me his card containing the name Sgt. Dick Hafdahl, Buena Park Police Department, Vice Narcotics Bureau. On the back of the card was a handwritten receipt for 1 roll Kodacolor II film. A copy of the front and back sides of the card are attached hereto as Appendix "A". The film has not been returned to me.

5. I was then required to produce identification by the vice officers, and I complied by giving them my Publicists Guild identification card.

Excerpts From Affidavits in Opposition to Application for Temporary Restraining Order.

(a) Affidavit of Judge John H. Smith, Jr. [R. pp. 71-72].

Filed December 3, 1973

JUDGE JOHN H. SMITH, JR., being first duly sworn, deposes and says:

1. I am a Judge of the Municipal Court in and for the Central Orange County Judicial District.

2. On November 23, 1973, I viewed the movie "Deep Throat" at the Pussycat Theater at 6177 Beach Boulevard, City of Buena Park.

3. At about 1:30 p.m., November 23, Mr. John Anderson, a Deputy District Attorney for the County of Orange, and I met with police officers on the sidewalk in front of the theater where I signed a search warrant instructing police officers to seize the film and all ticket office receipts as further evidence of the commission of an unlawful act.

4. At about 4:20 p.m., on November 23, 1973, I signed another warrant instructing the Buena Park Police Officers to seize another copy of the film "Deep Throat" and all monies contained in the ticket booth cash drawer.

5. At about 10:00 p.m., after having viewed the movie "Deep Throat" again, I signed another warrant instructing the officers to seize this copy of "Deep Throat" and all monies held in the ticket office to that date.

6. On Saturday, November 24, 1973, I signed a 4th search warrant instructing the officers to seize an additional copy of the film "Deep Throat" and any proceeds of ticket sales held up to that time.

7. At this time I am holding four copies of the film "Deep Throat" and funds slightly exceeding $5,000. Said films and funds are in my custody and control.

8. While at the theater on November 23, at 1:30 p.m., and while receiving the warrant and affidavit on the sidewalk in front of the theater, I ordered police officers to seize the film from a camera being used by an individual to take photographs of myself and others who were performing a judicial function.

* * *

(b) Affidavit of Arthur Fontecchio [R. pp. 73-76].

Filed December 3, 1973

ARTHUR FONTECCHIO, being first duly sworn, deposes and says:

1. I am employed as a detective of the Buena Park Police Department, currently assigned to the Vice-Narcotics Division.

2. On Tuesday, November 20, 1973, Detective Harrison, Sergeant Hofdahl and I viewed the movie "Deep Throat" at the Hollywood Pussycat Theater.

3. On Wednesday, November 21, 1973, I prepared an Affidavit and went to the Orange County District Attorney's Office where I discussed the matter with Deputy District Attorney John Anderson. As a result, a search warrant and affidavit in support was prepared by Mr. Anderson and arrangements were made for a judicial review of the film if it was brought to the Buena Park Pussycat Theater as advertised.

4. On Friday, November 23, 1973, at approximately 12:30 p.m., Mr. Anderson and the Honorable Judge John Smith responded to the Pussycat (C.T. p. 73) Theater in Buena Park for the purpose of viewing the film to determine if it was the same as the film viewed by us at the Pussycat Theater in Hollywood. After viewing the film and determining that it was essentially the same as the film viewed by the officers in Hollywood, I left the viewing area of the theater to await the conclusion of the movie and the arrival of Judge Smith and John Anderson.

5. At approximately 1:30 p.m. I contacted Judge Smith and Deputy District Attorney John Anderson as they exited the front of the theater and Judge Smith reviewed the Affidavit and Search Warrant and signed same.

6. While the Judge was reviewing the Affidavit, a male white adult identified as Donald Haley began taking photographs of the Judge, myself, Sergeant Hofdahl, Detective Harrison and John Anderson. Judge Smith ordered Detective Harrison to seize subject Haley's film, to which order Harrison complied.

7. After receiving the warrant signed by Judge Smith, I served same on Mr. Edward Lee Bailey, manager of the theater. After he read the original search warrant signed by the judge, I gave Mr. Bailey a copy of said warrant. As the officers left the theater Mr. Bailey stated another copy of the film would be shown as soon as he could obtain one.

8. At approximately 3:00 p.m. the above officers returned to the Pussycat Theater for the purpose of viewing the aforementioned film which was being shown again. It was my intention to commence issuing citations for each additional showing of the film, as is our current procedure, unless the film proved to be a different version, as had happened to me in the past at that theater.

9. After viewing the movie "Deep Throat" in its entirety I observed that this copy was different than the copy viewed by Judge Smith in the following ways: the second copy had an additional scene of sexual intercourse, and oral copulation; obvious changes in lighting, sound and editing.

10. As a result of these changes I prepared an Affidavit in Support of Search Warrant with the observed changes added to same. I responded to Judge Smith who reviewed the Affidavit and Search Warrant at approximately 4:20 p.m,. November 23, 1973, and signed same authorizing seizure.

11. At approximately 4:30 p.m. the above officers again returned to the Pussycat Theater and served the second warrant on Edward L. Bailey. After seizing the items listed in the return to the second warrant the officers left the theater. Prior to leaving Bailey stated another copy would be shown if he was able to obtain same.

12. At approximately 7:45 p.m. that night the above officers returned to the Pussycat Theater and observed that another copy of "Deep Throat" was being shown. The officers again viewed the entire movie and I observed the following changes. The

third copy of "Deep Throat" consisted of one (1) act of oral copulation and one (1) act of sexual intercourse, obvious lighting, sound and editing changes not shown in the copy viewed by Judge Smith. The officers also detected differences in editing between the second and third films. Due to these changes I prepared another Affidavit in Support of Search Warrant listing the changes and again made contact with Judge Smith at approximately 9:00 p.m. and reported the differences to him.

13. After reviewing the third Affidavit and Search Warrant and signing same, Judge Smith decided he would like to again view the film. The officers returned to the theater with Judge Smith, with him entering separately at approximately 9:15 p.m. I sat next to the Judge and pointed out the changes observed by the officers and at approximately 10:00 p.m. Judge Smith ordered me to serve the warrant and I complied. I served same on Edward L. Bailey who again read the entire warrant (original) and I gave him a copy of the warrant.

14. There were changes in warrants 1, 2, and 3 as to the seizure of monies in the cash drawers and safe because Judge Smith had ordered me to seize the money as evidence and to force the theater safe open if necessary. On seizures one and two, monies seized by the officers were taken from the cash drawer only. On seizure number three monies were seized from the cash drawers and from the safe with the use of a locksmith to open the safe.

15. On Saturday, November 24, 1973, at approximately noon, the officers learned that "Deep Throat" would again be showing. At approximately 2:30 p.m., myself, Harrison and Hafdahl responded to Judge Smith's residence and turned over all items seized on November 23, 1973, and advised him that the above film would again be showing.

16. The officers again viewed the film and again noticed changes in this film from prior films in sound, lighting and editing. Another Affidavit in Support of Search Warrant and Search Warrant which was reviewed by Judge Smith and signed.

17. On November 24, 1973, at approximately 6:00 p.m. the officers returned to the Pussycat Theater and I served the fourth Search Warrant signed by Judge Smith on Edward Bailey, obtaining the items listed in the return to that warrant.

18. It is my opinion and belief that the management of the theater was able to show at least four complete showings of the film while the officers were obtaining new warrants on Friday, November 23, 1973, and on Saturday, November 24, 1973, the management was able to show at least four complete showings and were able to keep all monies involved due to making bank drops prior to and between the seizures.

* * *

(c) Affidavit of Thomas R. Hofdahl [R. pp. 77-80].

Filed December 3, 1973

THOMAS R. HOFDAHL, being first duly sworn, deposes and says:

1. I am employed as a Sergeant of the Buena Park Police Department, currently assigned to head the Vice-Narcotics Division.
2. On November 20, 1973, myself, Detective Fontecchio and Detective Harrison viewed the movie "Deep Throat" at the Pussycat Theater on Santa Monica Boulevard in the City of Hollywood.
3. Detective Fontecchio prepared an Affidavit in Support of Search Warrant and Search Warrant under the direction of Mr. John Anderson, Orange County District Attorney's office. This took place on November 21, 1973, in anticipation of the movie, "Deep Throat" being shown at the Pussycat Theater, 6177 Beach Boulevard, Buena Park, California.
4. Arrangements were also made that day for Mr. John Anderson and Judge John Smith, Central Orange County Municipal Court to meet with the above named officers about noon, Friday, November 23, 1973. This meeting took place at the Buena Park Police Department where Mr. Anderson was given $20.00 Buena Park city funds to pay admission into the theater for himself and Judge Smith.
5. The above officers entered the theater at about 12:45 p.m. and viewed about 45 minutes of the movie, "Deep Throat" which was observed to be essentially the same as that viewed in Hollywood, the movie the affidavit was based upon.

6. At about 1:30 p.m., November 28, 1973, the above officers met with Mr. Anderson and Judge Smith on the sidewalk in front of the theater where Judge Smith signed the search warrant after Mr. Anderson wrote, "Money contained in the ticket booth and specifically for a $20.00 bill, serial number B 08574869B" on line 17, page 2 of search warrant. The ticket office receipts were being seized as evidence of an unlawful act and to secure the marked money. The above quote was also entered on the Affidavit in Support of Search Warrant by Mr. Anderson, line 6, page 2 (attachment F).
7. At about 1:35 p.m., the above officers re-entered the theater to serve the search warrant. I instructed Det. Harrison to go to the projection room and seize the film and I observed Det. Fontecchio hand Mr. Edward Bailey, manager of the theater, the original copy of the search warrant and leave a xerox copy of same. I told Mr. Bailey the warrant called for seizure. Mr. Bailey removed the money from the ticket booth cash drawer which was counted by he and Det. Fontecchio ($305.00). Det. Fontecchio wrote an inventory of items seized which was written on the reverse side of the search warrant given to Mr. Bailey.
8. Mr. Anderson had instructed us to view every subsequent copy of the movie "Deep Throat" and if we detected differences between any copies to seize them also with a new search warrant. If the films were identical we would not seize them but issue citations for every day of showing just as we had done with prior films.

9. We viewed another copy of the film at about 3:00 p.m. and went to Judge Smith. We had detected an additional act of sexual intercourse not present in the first edition. Judge Smith signed a second search warrant and supporting affidavit at about 4:30 p.m., November 23, 1973. This was signed after *I* had written, "Money contained in the ticket booth cash drawer," on line 17, page 2 of the search warrant and line 6, page 2 of supporting affidavit (attachment G).

10. This warrant was served at about 4:30 p.m. with Det. Harrison seizing the film and Det. Fontecchio showing Mr. Bailey the original and leaving another copy.

11. At about 7:45 p.m., November 23, 1973, we again entered the theater and sat through a complete showing of the film "Deep Throat" detecting still again differences in editing.

12. We went back to Judge Smith and reported seeing differences. The judge signed a third search warrant and affidavit at 9:00 p.m., November 23, 1973, after Det. Fontecchio had written, "All monies on premises received in cash drawers or safes at above locations" at the direction of Judge Smith (attachment H). The judge also stated he would like to view the movie again. We drove Judge Smith to the theater and gave him $5.00 in Buena Park city funds for admission. We entered the premises separately. Det. Fontecchio sat next to the judge and pointed out differences he had seen.

13. At about 10:00 p.m., Det. Fontecchio told me the judge had said to serve his third warrant now. This

was done with Det. Harrison seizing the film and Det. Fontecchio presenting Mr. Bailey with the original and leaving a copy. At the order of Judge Smith, I arranged for a locksmith to open the bottom portion of the safe. $4,082.33 was seized in total. This concluded the activities of Friday, November 23, 1973. (C.T. p. 79)

14. On Saturday, November 24, 1973, at about 2:45 p.m., the above officers responded to Judge Smith's residence and left him everything we had seized the day before, including all films, money, posters and schedules. Judge Smith also signed a fourth search warrant and affidavit at 4:00 p.m. (attachment I). This warrant was served at about 6:00 p.m. with your affiant seizing the film. Det. Fontecchio presented Mr. Bailey with the original and left a copy. $197.18 was also seized. The fruits of the seizure were delivered to Judge Smith on November 26, 1973.

15. As near as your affiant can determine the theater did have at least four complete showings of the film "Deep Throat" while officers were viewing same and obtaining search warrants. This is on November 23, 1973. On November 24, 1973, they had at least four more additional showings which were completed.

16. On November 23, 1973, at the first seizure our search warrant called for retrieval of a certain $20.00 bill which we could not locate. Mr. Bailey advised us he had taken a large amount of money to the Bank of America and deposited same. All the $20.00 bills had gone to the bank with that deposit. On November 24, 1973, Mr. Bailey told

us he had been ordered by his superiors to make as many bank drops as possible so we would not seize too much money.

17. To the best of my information and belief, the theater was able to complete some eight showings of the film and to make bank deposits of the money received for those showings, with no theater patrons demanding refunds on those occasions.

18. On each of the four occasions that a copy of the film was seized, it had been determined by myself and the other officers that the copies were different from those previously seized. Had we observed any copy which appeared substantially identical to previous copies, it was my intention to cease any further seizures and allow the film to continue its run while our department followed the current procedure of issuance of citations for subsequent showings.

* * *

(d) Affidavit of John F. Anderson.

Filed December 3, 1973 [R. pp. 84-87]

JOHN F. ANDERSON, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a Deputy District Attorney for the County of Orange.

2. I am currently assigned to the Writs and Appeals Section of the District Attorney's Office, and in that capacity, since July 1973, have been assigned as the deputy primarily responsible for the prosecution of violations of the California Penal Code

provisions relating to pornography, obscenity, and lewdness.

3. On July 31, 1973, I first had occasion to assist members of the Buena Park Police Department in actions taken against the Pussycat Theater located in their city.

4. On August 1, 1973, I prepared the search warrant for the seizure of a film entitled "Making the Blue Film". On that occasion I instructed Detectives Fontecchio and Hofdahl that pursuant to the mandates of the United States Supreme Court as set forth in *Heller v. New York,* they were to seize only one copy of the film. The officers were further advised that subsequent showings of a copy of the film were to be allowed with citations being issued in lieu of arrests and/or further seizures.

5. On August 13, 1973, I prepared a second search warrant for the seizure of the same film because officers who had been issuing citations in the interim period had noted that a different version was being shown which included additional scenes of sexual activities not present in the first film.

6. On August 1, 1973, Judge James O. Perez of the North Orange County Municipal Court had viewed the film prior to signing the search warrant which was served on that date. The same judge signed the search warrant on August 13, 1973, based on the affidavit in support of the warrant in which the differences between the two copies of the film were described, sworn and subscribed to by the officers.

7. On August 14, 1973, I spoke with Attorney John Weston of the law firm of Fleishman, McDaniel,

Brown, and Weston, who represented the Pussycat Theater then, as now. *Mr. Weston advised that there are generally two versions of each of the movies shown at the Pussycat Theater, one "hard core" version and one "soft core" version.* He explained that the normal procedure for the theater is to display the hard core version first, and if that is seized, to then display the softer version. Mr. Weston related that apparently the theater chain had erred in which version was shown first and the harder version seized on August 13, 1973, did indeed contain additional scenes of sexual activities.

8. No court action of any type has been taken to date by the theater to obtain a return of either copy of that film.

9. In every other case since July 1973, invoking a seizure of a film from the theater, the Buena Park Police Officers have seized only one (C.T. p. 85) copy and have allowed the display of the movie to continue, and have issued citations for violation of California Penal Code Sections 311.2 and 311.5 in lieu of arresting theater personnel. This has been done pursuant to my advice to the officers that this was the legally preferred method.

10. On November 23, 1973, when the first seizure of "Deep Throat" was made at the Buena Park Pussycat Theater, I was present at the theater when Judge John H. Smith Jr. viewed the film and signed the first search warrant. (Attachment F.) At that time I advised the members of the Police Department to continue viewing any additional showings of the film "Deep Throat" but to make

no further seizures and use the normal citation procedure unless they detected differences in subsequent copies of the film as had happened to them in the "Making the Blue Film" case. They were advised to note and add the difference, if any, to any subsequent search warrant affidavit.

11. I was not present at any subsequent showings or seizures at the Pussycat Theater.

12. On Monday, November 26, 1973, Oretta Sears of this office prepared an Application for Order to Show Cause and for a Temporary Restraining Order, which was granted by the Honorable Byron K. McMillan, Judge of the Superior Court, County of Orange. At about noon that same date a copy of the Application and the original Order to Show Cause and Temporary Restraining Order were served on the Pussycat Theater by Detective Hofdahl. (Attachment J.)

13. Pursuant to the order, (commencing at line 25, page 2, thereof) regarding a speedy hearing, *Attorney David M. Brown noticed my officer to be in Department 21 of the Superior Court* (Judge McMillan's court) at 2:30 p.m.

14. At 2:30 p.m. that same date a hearing was commenced on the record before Judge McMillan with counsel for both parties present.

15. On Tuesday November 27, at 10:00 a.m., Judge McMillan viewed the film "Deep Throat". I was sworn and testified that it was the same film that had been viewed by myself and Judge Smith at the Pussycat Theater on November 23, 1973. Dr. Donald A. Sears was sworn and testified as

follows: that he is an expert on redeeming social value as it relates to the obscenity statutes in effect in California, that he had viewed the same showing of "Deep Throat" as Judge McMillan and determined in his opinion that it was utterly without redeeming social value, and gave his reasons therefore.

16. Following the testimony of the witnesses, Judge McMillan made a ruling based on his viewing and the testimony that "Deep Throat" was obscene beyond any reasonable doubt, and issued an Order of Seizure After Adversary Hearing. (Attachment K.)

17. The Order of Seizure was served on defendant (plaintiff in this action) Pussycat Theater, by members of the Buena Park Police Department, at the direction of Judge McMillan, on Tuesday, November 27, 1973.

18. At the time of the *serving of the Order, no copies of the film, "Deep Throat" were found to be at the theater and no seizure was made.* A copy of the order was left with the theater manager Edward L. Bailey and he was advised by the officers serving the order that they would make a seizure pursuant to the order if, in fact, a copy were to be found showing at the theater.

* * *

(e) Declaration of Cecil Hicks.

Filed January 29, 1974 [R. pp. 330-331]

CECIL HICKS deposes and says:

That he now is and at all times mentioned in Plaintiff's Complaint for Damages and Injunction, pursuant to the Civil Rights Act, has been the duly qualified and acting District Attorney of the County of Orange. As District Attorney, he is empowered and required by State law to prosecute any and all offenses arising upon violation of the laws of the State of California, occurring within the territorial limits of Orange County. That violations of California Penal Code Sections 311.2 and 311.5 are misdemeanor offenses.

That the records of his office indicate that two prosecutions were initiated against Plaintiff herein for violation of Penal Code Sections 311.2 and 311.5. One contained two separate counts and the other five separate counts.

That Declarant has not conspired with anyone, or at all, nor has he entered into any agreement with anyone, or at all, to enforce the provisions of Sections 311.2 and 311.5 of the California Penal Code, or any other section thereof, or any law, in any illegal or wrongful or arbitrary manner, or for any illegal or wrongful purpose, or for the purpose of denying to anyone any civil right or any right guaranteed under the Constitution of the United States or any other right guaranteed or provided for by any law.

That Declarant has not threatened Plaintiffs, or any of them, with further or any prosecutions. In this connection, however, Declarant states that it is his intention, and he will to the best of his ability, fulfill the duties of

his office including the prosecution of misdemeanor offenses within the jurisdiction of his office.

Declarant certifies that the above statements are true of his own knowledge and that if sworn as a witness, he could testify competently thereto.

* * *

(f) Affidavit of Daniel Harrison.

Filed November 29, 1973 [R. pp. 46-47]

DANIEL HARRISON, being first duly sworn, deposes and says:

1. I am employed as a Detective of the Buena Park Police Department, currently assigned to the Vice-Narcotics Division.

2. I was present with Sergeant Hofdahl and Detective Fontecchio at each incident to which they have referred in their affidavits; my function being to make the physical seizures of the films in the projection booth pursuant to the orders of Sgt. Hofdahl.

3. At the time of the first seizure on Friday, November 23, 1973, at about 1:30 p.m., while Judge Smith was reviewing the first search warrant and affidavit on the sidewalk in front of the theater, a Mr. Donald Haley commenced taking pictures of the judge, Deputy District Attorney John Anderson, and the officers present. Judge Smith ordered me to stop Mr. Haley's activities and obtain some identification from him and determine if he was a member of the press. Upon determining that he

was not a member of the press and was an employee of Pussycat Theater, Judge Smith ordered me to seize the film in his camera. I complied with the judge's order and left Mr. Haley a receipt for said film.

4. During the second seizure of the film on Friday, at about 4:30 p.m. I was the officer who went to the projection booth and physically seized the film. At that time I had a conversation with the projectionist, Carl Schmidt. I was told by Mr. Schmidt, "This is the filthiest movie I've ever shown," and he then said, "How come it's legal in L.A. County and not here?"

5. In response to Mr. Schmidt's question, I stated, 'Because of jurisdiction, this is Orange County." He also asked, "Are you going to let it play or are you going to take all of the copies?", to which I replied, "I don't know."

6. At no time did I state that, ". . . we're going to seize every print because this is Orange County."

7. Mr. Edward Bailey related to me that the theater did show the film "Deep Throat" in its entirety at least four times and that the profits were maintained by the theater by means of hourly bank deposits.

8. I have observed that pending further actions by the courts, the theater has ceased to show "Deep Throat" but is remaining open and is showing another film.

(g) Affidavit of Oretta D. Sears.

Filed January 29, 1974 [R. pp. 332-333]

ORETTA D. SEARS, being first duly sworn, deposes and says:

I am an attorney admitted to practice in the State of California and I am the Deputy District Attorney in charge of the Writs and Appeals Section of the Orange County District Attorney's Office. Pursuant to the duties of my position, I have sought an adversary hearing on the issue of obscenity in this matter and I have helped prepare the application for an order asking the Defendants to appear before the Superior Court for the purpose of such hearing. Thereafter, I appeared at the Superior Court hearing, presented evidence and argued the legal issues. Also, as part of my duties, I directed the obtaining of the four search warrants resulting in the seizure of four copies of the film; in each instance, after the first seizure. This was done because I had been informed that the copies shown differed from the first copy.

At all times I acted in conformance with what I believed to be the duties of my position and in an honest effort to enforce the laws of the State of California and for no other reason.

* * *

Notification and Certificate (Three Judge District Court).

Filed December 28, 1973 [R. p. 180]

[Caption Omitted in Printing]

TO: THE HONORABLE RICHARD H. CHAMBERS, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Pursuant to the provisions of 28 U.S.C. Section 2284, you are notified that the complaint now pending in the above cause involves, among other things, the enforcement, operation and execution of State statutes and seeks an injunction restraining the enforcement and execution of those statutes and of orders of a State court made (C.T. p. 180) pursuant thereto.

I certify that I have examined the complaint and that, in my opinion, the formation of a district court of three judges, as set forth in 28 U.S.C. Section 2284, is required.

IT IS ORDERED that the original of this Notification and Certificate be filed and that the Clerk forward true copies thereof by United States mail to Chief Judge Chambers and to all counsel who have appeared in this proceeding.

Order.

Filed December 28, 1973 [R. pp. 182-185]

[Caption Omitted in Printing]

This matter is before the Court on the application of plaintiff corporation, who operates a motion picture theatre known as the Pussycat Theatre in Buena Park, California, and plaintiff Miranda, who owns the land

on which the theatre is located, for a temporary restraining order. The temporary restraining order seeks to require defendants Cecil Hicks, District Attorney of the County of Orange, State of California, Oretta Sears, Deputy District Attorney of the same County, Dudley D. Gourley, Chief of Police of the City of Buena Park and City of Buena Park Police Officers Arthur Fontecchio, Richard Hafdahl and Daniel Harrison to return three of four prints of the film "Deep Throat" seized by certain of the defendants from plaintiff corporation's theater, to enjoin further seizures of additional prints that plaintiff corporation may show at its theatre and to return certain cash impounded at the time of the seizure of the above-noted prints pending hearing on a requested order to show cause seeking similar relief on a more permanent basis and the convening of a three-judge court pursuant to 28 U.S.C. Sections 2281 and 2284 to hear the claims raised in plaintiffs' complaint.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1343(3) and (4) and 42 U.S.C. Section 1983.

The record before us shows that on November 23 and 24, 1973 law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code Sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.

Thereafter on November 26, 1973 defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs

and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973 at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff corporation's theater seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.

In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required. The temporary restraining order sought by plaintiffs is denied.

The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the ap-

propriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. Section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges (C.T. p. 184) a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification and certification in accordance with 28 U.S.C. Sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

Dated: December 28, 1973.

Lawrence T. Lydick
United States District Judge

Defendants' Answer to Complaint for Declaratory Judgment, Damages and Injunction.

Filed January 29, 1974 [R. pp. 215-219]

[Caption Omitted in Printing]

The defendants Cecil Hicks and Oretta D. Sears for answer to the complaint allege as follows:

* * *

Fourth Defense

By way of affirmative defense defendants Cecil Hicks and Oretta D. Sears affirmatively allege as follows:

* * *

I

On November 20, 1973 Officers of the Buena Park Police Department viewed a showing of the 35 mm film "Deep Throat" at the Pussycat Theater in Hollywood. The viewing was done in preparation for the opening of "Deep Throat" at the Buena Park Pussycat Theater.

II

On Friday, November 23, 1973 the film opened at the Buena Park location and was viewed by the Honorable Judge John H. Smith, Jr., of the Central Orange County Judicial District. Following the viewing, Judge Smith, based upon the affidavit prepared previously by Officer Fontecchio, and on the basis of his own viewing, found that there was probable cause to believe that the film "Deep Throat" was obscene and issued a search warrant ordering the seizure of the film. The film was seized that day at about 1:30 p.m. along with money, posters and other items listed in the return. (Certified copies of the search warrant, affidavit and return are attached labeled Attachment F.)

III

That same day, at about 4:30 p.m. another seizure was made of the copy of "Deep Throat" which was being shown. The seizure was made pursuant to a second search warrant, the affidavit of which stated that the second copy of the film in fact differed from that seen by Judge Smith in that there were additional scenes of sexual activities not present in the first film. (Certified copies of the affidavit, search warrant and return are attached and labeled Attachment G.)

IV

Later that day a third seizure was made, based on a third search warrant signed by Judge Smith, who had personally returned to the theater again to view the film. During this viewing Officer Fontecchio sat with the judge and pointed out differences between the copy being viewed and the previously seized copies. Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further, specifically ordered the officers to seize all monies present in the theater, including any money in the safe. Pursuant to the judge's direct order, the officers called in a licensed locksmith who opened the floor safe of the theater, from which some $4,000 was seized. An affidavit by Judge Smith is attached and labeled Attachment A. (Certified copies of the search warrant, affidavit and return are attached and labeled Attachment H.)

V

On Saturday, November 24, 1973 the officers deposited with Judge Smith all items which had been seized pursuant to the three warrants. Also on that date they observed a fourth copy of the film "Deep Throat" which was being shown. The officers saw the film and noted that this fourth film was different from

the seized copies, they reported the differences to Judge Smith who issued a search warrant and a fourth seizure of the film took place. (Certified copies of the search warrant, affidavit and return are attached and are labeled Attachment I.)

On Monday, November 26, 1973 in the Orange County Superior Court the People of the State of California applied for and were granted a Temporary Restraining Order and Order to Show Cause *in re* a determination of obscenity, of the movie "Deep Throat". In its order to show cause the Superior Court of Orange County ordered defendant to appear and show cause five days later why all copies of the film should not be ordered seized as being obscene. The order further provided, however, that the hearing on the issue of obscenity could be had at the request of defendant at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice. (Certified copies of the application and of the order are attached hereto and labeled Attachment J.) At defendant's request, at 2:30 p.m. on that day, a hearing was had in Department 21 of the Orange County Superior Court, the Honorable Byron K. McMillan, Judge Presiding, the judge who had issued the Order to Show Cause and Temporary Restraining Order.

VI

Attorney David M. Brown appeared at said hearing on behalf of the theater and plaintiffs named in this action and argued the lack of jurisdiction of the Orange County Superior Court to hold such a hearing. He filed with the Orange County Superior Court a short document entitled "Reservation of Federal Constitutional Questions" in which he stated "Defendants . . . reserve all federal constitutional claims for purposes of federal

jurisdiction." Judge McMillan, of the Orange County Superior Court, ruled that jurisdiction was present, at which time Mr. Brown refused to submit to the jurisdiction of the state court. The matter was recessed until the following morning at 9 a.m. for the taking of evidence and Mr. Brown was advised that if plaintiffs made no appearance, the hearing would be held in their absence.

VII

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence the court ruled that the film "Deep Throat" was obscene beyond reasonable doubt and issued an Order of Seizure After Adversary Hearing, directing officers to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theater or which were to be found there in the future, and to bring same before the court. (Certified copies of the transcript of the hearing and of the court's order are attached and labeled Attachments K and L.)

This order was served upon the theater that very day, though no seizure was made as no copies of the film were present.

VIII

On November 29, 1973 Plaintiffs, instead of pursuing the appellate remedies available to them in the state courts, sought a temporary restraining order from the United States District Court, Central District of California. The case was assigned to the Honorable Lawrence T. Lydick who denied the request for temporary restraining order but determined that the defendants' claim concerning issuance of the superior court were not "wholly insubstantial" and duly sought the convening of a three-judge court.

IX

Personal service of summons, complaint and accompanying points and authorities and affidavits was made on defendant District Attorney Cecil Hicks on January 14, 1974 and on defendant Deputy District Attorney Oretta D. Sears on January 11, 1974.

X

As shown by the declarations of the Honorable John H. Smith Jr., (Attachment A), Detective Arthur Fontecchio (Attachment B), Detective Thomas R. Hafdahl (Attachment C), Detective Daniel Harrison (Attachment D), Deputy District Attorney John F. Anderson (Attachment E), District Attorney Cecil Hicks (Attachment M) and Deputy District Attorney Oretta D. Sears (Attachment N): (1) the four copies of the films were seized on the orders of a duly elected state judge; (2) four copies were ordered seized because they all differed one from another; (3) four copies would not have been ordered seized by the state judge and a search warrant for their seizure would not have even been sought prior to a final judicial determination on the issue of obscenity, had they not been different; (4) a duly filed criminal complaint alleging violation of a California Penal Code Section 311.2 has been filed in respect to each of the films involved in the seizures, and said complaint is presently pending in the Municipal Court, North Orange County Judicial District; (5) Defendants Cecil Hicks and Oretta D. Sears have at all times acted within the scope of their duties prescribed by law, have conscientiously and sincerely performed their duties, and have never misused or abused the powers of their office.

* * *

Excerpts From State Court Orders, Pleadings and Proceedings (Federal Court Attachments and Exhibits).

(a) State Order to Show Cause.

Filed January 29, 1974 [R. pp. 17-18]

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda, dba Pussycat Theater, Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson, and Jesse Lee Crabtree, Defendants. M-2248.

ORDER TO SHOW CAUSE, TEMPORARY RESTRAINING ORDER AND ORDER SHORTENING TIME.

[Filed November 27, 1973 in
Orange County Superior Court]

On the application of the People of the State of California and on the accompanying affidavit in support of search warrant, sworn and subscribed before me by Art Fontecchio and having personally viewed the 35 mm film entitled "Deep Throat" and having found from the above document and sworn testimony before me by Art Fontecchio and from my own observation that there is probable cause to believe: (a) that the premises located at 6177 Beach Boulevard, Buena Park, contain a copy of the said film entitled "Deep Throat" which is obscene under Penal Code Section 311.2 and 311.5; (b) that said copy of film is being held with the intent of displaying same and is being displayed.

IT IS HEREBY ORDERED that Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell and

Sandy Kay Thompson appear before the Orange County Superior Court, 700 Civic Center Drive West, Santa Ana, California, Department 21 of said Court, at 2:30 p.m. on Friday, November 30, 1973, there and then to show cause why all copies of the above-said film should not be ordered seized as contraband.

IT IS FURTHER ORDERED that the above-named persons, their agents, associates, counsel representatives or the persons or corporations in control of the premises refrain from showing, exhibiting, displaying or advertising the movie "DEEP THROAT": and further refrain from removing the said film from 6177 Beach Boulevard, Buena Park or in any way disposing of said copies of said film until after the conclusion of this Order to Show Cause hearing. Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell and Sandy Kay Thompson, their agents, associates, employers, counsel and representatives are hereby ordered to hold the above-described copies of film in the above-described premises at the disposal of the Court until the Order to show Cause hearing has been concluded.

The Plaintiff's motion for an order shortening time is hereby granted and Plaintiff is ordered to make service on the above-named corporation and persons on or before November 27, 1973, at 4:00 p.m.

It is further ordered that should it be deemed necessary by counsel for defendants or any of them, the hearing in re the Order to Show Cause may be set at any time prior to Friday, November 30, 1973, upon request of said counsel, provided (C.T. p. 272) counsel for the People receive one hour notice and subject to the schedule of this court.

Dated this 26th day of November, 1973.

BYRON K. McMILLAN
JUDGE OF THE SUPERIOR COURT

(b) Application for Order to Show Cause in State Court [R. pp. 24-25].

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda, dba Pussycat Theater, Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson, and Jesse Lee Crabtree, Defendants. M-2248.

APPLICATION FOR ORDER TO SHOW CAUSE AND FOR A TEMPORARY RESTRAINING ORDER

[Filed November 26, 1973
in Orange County Superior Court]

COMES NOW THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in the above-entitled action, who by their attorney, Cecil Hicks, and upon the subscribed and sworn affidavit in support of search warrant for the premises located at 6177 Beach Boulevard, Buena Park, of Art Fontecchio, which affidavit is attached hereto and incorporated by reference as though fully set forth herein, prays this Honorable Court to issue its order requesting Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson to appear before this Honorable Court and show cause why all copies of the 35 MM film entitled "DEEP THROAT" should not be declared obscene by this Honorable Court and why they should not be forever enjoined from further exhibition, showing, displaying, advertising, selling, or publishing said copies or any part thereof.

Plaintiff, People of the State of California, upon that same affidavit and for the reasons herein stated,

ask that this Honorable Court issue a temporary restraining order prohibiting the above-named defendants from showing, exhibiting, displaying, or advertising the movie "DEEP THROAT" and further prohibiting the above-named persons from removing the above-described copies of the said film out of 6177 Beach Boulevard, Buena Park, and from disposing of same in any manner, and further ordering said defendants to hold said copies of film at the court's disposal and to produce same at the court's request.

A complaint has been filed against the above-named defendants and others alleging violations of Penal Code Sections 311.2 and 311.5.

Plaintiff, because of the United States Supreme Court requirements, respectfully urges this Honorable Court to order the matter to be heard on Friday, November 30, 1973, or earlier and to shorten time to allow hearing to be had on that date.

(c) Excerpts From Reporter's Transcript of State Court Proceedings Held November 27-28, 1973 [R. pp. 283-319].

The Superior Court of the State of California, for the County of Orange.

Department No. 21.

Hon. Byron K. McMillan, Judge.

The People of the State of California, Plaintiff, vs. Vincent Miranda, et al., Defendants. No. M-2248.

REPORTER'S TRANSCRIPT PURSUANT TO SECTIONS 1539 and 1540 OF THE PENAL CODE
REPORTER'S TRANSCIPT

November 27, 28, 1973.

* * *

SANTA ANA, CALIFORNIA—TUESDAY, NOVEMBER 27, 1973

THE COURT: People versus Miranda.

* * *

MR. BROWN: Your Honor, my name is David M. Brown, a member of the Fleishman, McDaniel, Brown & Weston and we are here representing Vincent Miranda, Walnut Properties, Incorporated, and Edward Lee Bailey, James Samuel Lytell; at this time I am not authorized to enter an appearance on behalf of Sandy Kay Thompson or Jesse Lee Crabtree.

I am appearing here, Your Honor, for one purpose and one purpose only, and that is to contest the jurisdiction of this Court over the subject matter contained in the Order to Show Cause and temporary restraining order.

I am not here to argue or otherwise present evidence or do anything else with respect to the obscenity or nonobscenity of the film Deep Throat, because it is our considered position that the Court has no jurisdiction and no authority in law to deal in any way with that question or to order the temporary restraining order which has been issued or the Order to Show Cause. (T. p. 3 ll. 1-18.)

* * *

The People have filed a criminal prosecution; that is their remedy under the laws of the State of California, there is no corresponding civil remedy to enjoin the exhibition of the film to seize all copies of the film or to declare it obscene. (T. p. 4 ll. 13-17.)

* * *

Now, all I have before me is an Order to Show Cause without a proceeding; there is not even a complaint, not even a complaint to file in the Superior Court.

Now, where does the Superior Court have jurisdiction to enter a temporary restraining order where there is not even a case pending before the Superior Court?

I have never heard of such a thing and if there is jurisdiction to do it, it seems to me the burden is upon the plaintiff to show where the jurisdiction is and they plainly have not done so.

There is no authority whatsoever in the papers that the plaintiff has filed, not a single citation of authority to show where the legal authority is for the extraordinary relief which the Court has issued. (T. pp. 6-7.)

* * *

Now, I think, I find myself in an unfortunate posture because I am trying to argue against something which is formless, shapeless, has no name, and I think perhaps it would be appropriate before any further argument to get on the record from the plaintiff a statement of what authority the plaintiff is proceeding under in this matter.

If I am to argue against it, I think I am entitled to know what it is.

So, with the indulgence of the Court, I would ask Mrs. Sears to put that on the record.

MRS. SEARS: Yes, I would be delighted to do so.

If the Court pleases, I think counsel has made several statements, to wit, concerning Red Light Abatement actions but what we are really dealing with is not a Red Light Abatement yet.

We have not yet asked for the closure of the theater as part of our relief, which is, of course, the primary purpose of the Red Light Abatement Act and we may or may not, I do not know. (T. pp. 8-9.)

* * *

I should point to the Court an Order to Show Cause issued in conjunction with a search warrant and this is what we must remember that whatever you wish to call this proceeding, when he states it as a complaint, equity, et cetera, et cetera, I went that route once and I was told, "It ain't in equity, ma'am," in just those words in the Lear Case.

What we are dealing with is an order by the Court requesting that a certain seizure be made and that a hearing be had forthwith before anything else goes on.

In other words, an order by the Court to keep the status quo rather than to seize, make a mass seizure, because that is what it amounts to, the request of the People is that all copies be seized. (T. p. 9.)

* * *

Now, the authority for seizing items that are there as contraband, I think is within the purview of 1538.5 and 1540 and 1536; any contraband, any time the Court has reason to believe that contraband exists, the Court has a right to seize it.

The authority to proceed with an adversary hearing is found in the fact that the Supreme Court of the United States considers this to be a proper way to do it; it is also found in the 1538.5 which specifies that the statute is not intended to interfere with hearings required under the First Amendment and obviously it

seems to me, then, that the Court's power under the California Constitution which gives the Court power to do all that which is necessary to guarantee the rights of the defendant under the First Amendment. (T. pp. 13-14.)

* * *

MR. BROWN. I now understand that the Court has not issued any search warrant, per se; it has issued a temporary restraining order.

Now, the curious thing is that the Court has already made a mass seizure of the film Deep Throat before any hearing, adversary or otherwise, on the issue of obscenity.

There has already been a mass seizure, because my client has been ordered not to exhibit the film Deep Throat to anyone pending hearing on an Order to Show Cause.

Now, call it mass seizure, call it a total prior restraint on the freedom of expression and it is both of those things, but they have preceded the hearing and not followed the hearing.

I would like to point out to the Court also if the Court alleged jurisdiction lies in its authority to issue search warrants, then, how can it have any authority to declare the film Deep Throat to be obscene?

This is not an action for declaratory relief, apparently, it is solely an application for a search warrant.

Now, if that is true, the only issue before the Court is probable cause; is there or is there not probable cause to believe Deep Throat obscene?

If there is probable cause, a search warrant can issue.

Although I would state that the Federal Constitution prohibits another search warrant from issuing after four identical copies of the film and they are identical, have already been seized, but in any event the obscenity or nonobscenity of the film is not even in issue before the Court.

The Court can't render a decision that Deep Throat is obscene if this is only an application for search warrant; that is what the Penal Code Sections provide. (T. p. 20.)

* * *

MR. BROWN: It is our position that the Court has no jurisdiction in this proceeding to determine obscenity or nonobscenity. . . . we are of the firm opinion that there is no jurisdiction for the proceeding, that this entire proceeding violates the First, Fourth, and Fourteenth Amendment of the U.S. Constitution, and that accordingly we do not feel that we can litigate the issue of obscenity on the merits and we decline counsel's invitation to do so. (T. p. 29.)

* * *

THE COURT: Well, I do think that the Court is with jurisdiction to make a determination as to what is or isn't obscene.

MR. BROWN: With respect to that, Your Honor, it is our position that the Court has no jurisdiction in this proceeding to determine obscenity or nonobscenity.

There is no jurisdiction for this proceeding at all to determine anything.

If it is just an application for search warrant, then, it is just a question of probable cause.

In any event, we are of the firm opinion that there is no jurisdiction for the proceeding, that this entire

proceeding violates the First, Fourth, and Fourteenth Amendment of the U.S. Constitution, and that accordingly we do not feel that we can litigate the issue of obscenity on the merits and we decline counsel's invitation to do so.

MR. BROWN: Do I understand the Court has not seen the film?

THE COURT: I have not.

MR. BROWN: I only ask the question because the Order to Show Cause recites that the Court has seen.

THE COURT: Just says from observations. (T. p. 32.)

* * *

THE COURT: We will just continue the hearing over to nine o'clock tomorrow.

MR. BROWN: Well, Your Honor, I will object to any continuance. The Order to Show Cause recites—

THE COURT: That is just the next business day; it is now ten to four and I have a jury out and I have some things I have to do. We will go on from now until nine o'clock tomorrow. (T. pp. 34-35.)

* * *

MR. BROWN: I will indicate my appearance was solely for the purpose of contesting jurisdiction.

THE COURT: You don't have to come back tomorrow, if you are not here I will understand.

MR. BROWN: Without insulting the Court.

THE COURT: Yes. (T. p. 35.)

* * *

MRS. SEARS: I would like, since Dr. Sears is my husband and also the expert for the County in these cases, to ask Mr. Anderson to take over the questioning.

MR. ANDERSON: We would call Dr. Sears, Your Honor. (T. p. 38.)

* * *

THE COURT: Well, probably the most crucial point in the order and our determination is the finding of obscene beyond any reasonable doubt, and I don't know, I may not be an expert, I have seen a lot of stag films and I think that Deep Throat is no better and probably worse than a lot of the stag films that I have viewed. The closeup of anal sex, of penis ejaculated into the mouth of a woman, of group sex, and a lack of any kind of a plot, there is a stab of humor that is so base and so, just without real humor, that I really can't find any justification other than exploitation of sex and I think that the, the whole sake of the flick is its prurient appeal without anything else, and based upon what I saw, what I have heard, expert and otherwise, the Court does find that it is obscene beyond any reasonable doubt, that the reels are held at the Beach Boulevard address for the purpose of exhibition and the material should be seized and will so order it.

There is a question as to whether or not every time they come out with a new reel of this production we are going to have to make a subsequent order on it, and I think that is just a useless, expensive act. I would feel safe in saying any reel of Deep Throat, I don't see how they could make one good, that any reel ought to be snapped up. (T. pp. 43-44.)

* * *

(d) Appendix B to Affidavit of David Brown [R. p. 26].

Superior Court of the State of California, for the County of Orange.

People of the State of California, Plaintiff, vs. Vincent Miranda, etc., et al., Defendants. No. .....

RESERVATION OF FEDERAL CONSTITUTIONAL QUESTIONS

By appearing in the above-entitled action, Defendants do not waive but, on the contrary, specifically reserve all federal constitutional claims for purposes of federal jurisdiction.

DATED: November 27, 1973.

FLEISHMAN, McDANIEL, BROWN & WESTON

(e) Excerpts From Transcript of State Municipal Court Proceedings [R.T. pp. 369-399] Filed as Attachment to Affidavit of David Brown on February 2, 1974.

In the Municipal Court of the North Orange County Judicial District, State of California.

The People of the State of California, Plaintiff, vs. Edward Lee Bailey, James Samuel Lytell, Walnut Properties, Inc., Vincent Miranda, John Doe I, John Doe II, Defendants. Case No. NM73 06675.

TRANSCRIPT OF COURT PROCEEDINGS
HONORABLE MAX V. ELIASON,
JUDGE

JANUARY 29, 1974

MR. BRENT SWANSON, Deputy District Attorney, appeared as counsel for the People.

MR. DAVID M. BROWN, Attorney at Law, appeared as counsel for the Defendants.

DELIEZE CONNELL, Court Reporter. (T. p. 2.)

* * *

THE COURT: People versus Edward Lee Bailey, James Lytell, and I think there have been others added to the amended Complaint. Walnut Properties, Incorporated and Vincent Miranda. (T. p. 3.)

MR. BROWN: Yes, your Honor. David M. Brown appearing for the defendants.

MR. SWANSON: Brent Swanson appearing for the People, your Honor.

* * *

Now, finally, your Honor, you'll notice in reading the papers here that quantities of cash were seized from the theater on each occasion, in all about five thousand dollars. In this regard counsel and I will enter into a stipulation that the cash will be returned to the moving parties upon their written agreement that the police may make copies of the bills and cash which were seized and the copies may be admitted at the trial in lieu of the original money preserving any other objections to the legality of the seizure that we might have.

Is that the correct stipulation?

MR. SWANSON: That's the correct stipulation with the exception that I would think that if counsel intends to raise in some way some impropriety in seizure of that money that now is the time to do it. I mean, we're at a 1538.5 and as counsel noticed a Section 1539 and 1540 hearing, so if there is some

illegality that counsel intends to raise on that seizure, I think now is the time to do it not at trial.

MR. BROWN: The stipulation is only stating that we do not reserve any legal arguments which we have on this motion, but we do waive any best evidence objection to be received in evidence of the copies in lieu of the originals. (T. pp. 15-16.)

* * *

MR. SWANSON: With respect to Roman numeral V, the contention there basically is that the material itself is not obscene and therefore protected. As I mentioned a few moments ago, the defendant did bring this motion not only under 1538.5 but also 1539 and 1540 of the Penal Code and apparently that's the one area which counsel—this Roman number V would appear to be appropriate in a 1539-40 type of issue.

With respect to that particular Roman numeral V, the People would merely point out to the Court that absent a showing of films themselves, the Court simply would be unable to make that type of determination in this instance and since that has not been done, I would submit that the Court would have—would be unable to proceed with respect to that Roman numeral V.

MR. BROWN: Your Honor, to help out on that, we're not urging at this hearing the non obscenity of the film on the merits. That issue will be reserved for the trial, so I don't think the Court need worry about that. (T. p. 18.)

* * *

MR. SWANSON: Your Honor, might I inquire of counsel then because I think the People for purposes of sustaining two of the four basic counts and in the

first part of the Complaint are faced with a situation of either having the officers review each of those four films and then familiarize themselves with the differences between the two that your Honor is indicating that you'll be suppressing or perhaps counsel would stipulated that for purposes of trial that only the first film which was seized would need to be shown or otherwise described to the jury and that film could be stipulated then as being for all intents and purposes of the same one with the exception of very minor differences which would not affect the instant of obscenity. It was shown on each of the four alleged occasions.

MR. BROWN: Your Honor, I think for present purposes the Court has ruled the seizure of the last two prints was unlawful and they should be suppressed. I don't think we need get into now the question of whether the officers will be permitted to testify at the trial as to the contents of the last two films. They are in the officers' possession and I'm certain they have viewed them prior to Notice. They have made their observations whether they're admissible or not. Frankly, I doubt whether they'd be admissible because the seizures were unlawful, but I don't think the Court need reach that now. I think that's an issue to be decided at trial in the event that such testimony is offered. (T. p. 30.)

* * *

MR. SWANSON: Your Honor, I think counsel and I can resolve the problem by stipulating at this time, and this would be a stipulation which I think we're agreeing would be offered at the time of trial and would be binding upon both of us at that time, that each of the four copies are identical. I think perhaps that would solve our problem.

MR. BROWN: I would so stipulate, your Honor.

THE COURT: The stipulation will be received. All the argument here has been that the last three are the same.

MR. SWANSON: Well, I think we're trying to resolve the problem in a practical fashion, your Honor. It's not our desire to have to show more than one of those films at the time of trial if we can avoid it. The repetitiveness I think would have—

THE COURT: To make sure we understand the stipulation then, would you state it again.

MR. SWANSON: We're stipulating then, your Honor, that the three copies which were subsequently seized—In other words copies two, three, and four would be identical in every respect to the first film that was seized.

THE COURT: For purposes of trial?

MR. SWANSON: For purposes of trial, yes.

THE COURT: Do you so stipulate, Mr. Brown?

MR. BROWN: That's agreeable.

THE COURT: The stipulation will be received. (T. pp. 33-34.)

* * *

Affidavit of David Brown in Support of Preliminary Injunction Filed February 25, 1974 [R.T. pp. 365-367].

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, counsel of record for Plaintiffs herein.

2. All of the Defendants herein have moved to dismiss and for summary judgment claiming, *inter alia*, that the seizures of four prints of the film "Deep Throat" prior to any adversary hearing on the issue of obscenity, did not constitute harassment and bad faith law enforcement since the four copies were not identical. Defendants appear to concede that multiple seizures of identical prints of the same film, prior to an adversary hearing on the issue of obscenity, would constitute bad faith law enforcement and harassment, a concession compelled by the Supreme Court's recent decision in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789.

3. On January 29, 1974, proceedings were brought in the Municipal Court of the North Orange County Judicial District to suppress evidence and restore seized property in the case of *People of the State of California v. Edward Lee Bailey, et al.*, No. NM-7306675, the misdemeanor obscenity prosecution arising out of the seizures of the film "Deep Throat" at Plaintiffs' theatre. At the conclusion of the hearing, the Honorable MAX V. ELIASON, Judge of the said Municipal Court, granted the Motion to Suppress and Restore with respect to

the third and fourth copies of the film seized by Defendants.

The basis for the Court's ruling was that an examination of the Affidavits in support of the Search Warrants for the seizure of the second, third and fourth copies of the film revealed, on their face, that the second, third and fourth prints all were identical. The Court stated:

> "As to the affidavits being the same, being the same seizure, it appears that the last three are the same according to the affidavit. In view of Heller. . . . It appears that the last two seizures are not permitted because their being duplication. Therefore the §1538 to the last two seizures would be granted." [Reporter's Transcript, January 29, 1974, p. 29, lns. 15-22] [A copy of the said Reporter's Transcript is attached hereto as Appendix "A"].

4. In view of Judge Eliason's ruling that the Affidavits in support of the Search Warrants herein *do not even claim* that there are any differences between the second, third and fourth prints of the film "Deep Throat" seized by Defendants, the Defendants' present condition that the multiple seizures were made in good faith based upon claimed differences among the several prints is patently untenable.

* * *

Minute Order Retransferring Case [R. p. 340].

CIVIL MINUTES—GENERAL

Case No. 73-2775-LTL.

Date: 2/4/74.

Title: Vincent Miranda, etc. et al. v. Cecil Hicks, et al.

DOCKET ENTRY

On the Crt's own motn, IT IS ORD that deft's motn to dismiss complt, prev noted for hrg bef Judge Lydick on 3/4/74, 10 am, is transferred to the Calendar of Judge Ferguson, Crtroom #15 on the same date & at the same time. (F)

Present: Hon. Warren J. Ferguson, Judge; Beverly Corcoran, Deputy Clerk; Not Present, Court Reporter.

Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

PROCEEDINGS.

On the Court's own motion, IT IS ORDERED that defendant's motion to dismiss the complaint, previously noted for hearing before the Honorable Lawrence T. Lydick on March 4, 1974 at 10:00 A.M. is hereby transferred to the Calendar of the Honorable Warren J. Ferguson, Courtroon No 15 on the same day and at the same time.

Clerk's Letter [R. pp. 341-342].

United States District Court, Central District of California, Office of the Clerk, U.S. Courthouse, RM G-8, Los Angeles, California 90012.

Edward M. Kritzman, Clerk.
Edward F. Drew, Chief Deputy.

February 8, 1974

Fleishman, McDaniel, Brown & Weston
David M. Brown, Esq.
Suite 718 Max Factor Building
6922 Hollywood Boulevard
Hollywood, California 90028

Cecil Hicks, District Attorney
County of Orange, State of California
Michael R. Capizzi, Assistant District Attorney
Oretta D. Sears, Deputy District Attorney
By: John D. Conley, Deputy District Attorney
P. O. Box 808
Santa Ana, California 92702

Kinkle, Rodiger, Graf, Dewberry & Spriggs
Mario A. Iorillo, Esq.
621 Sunset Boulevard
Los Angeles, California 90012

Re: Vincent Miranda etc. vs. Cecil Hicks, et al.
Case No. 73-2775-LTL

Gentlemen:

Enclosed for your information is a copy of an Order of the Chief Judge of the Court of Appeals for the Ninth Circuit designating a three-judge court to hear and determine the above cause and all motions and proceedings therein.

Filings therein in the future should be directed to the Honorable Warren J. Ferguson, U.S. District Judge for the Central District of California. Copies of all filings should be mailed to the Honorable Walter Ely, U.S. Circuit Judge for the Ninth Circuit and the Honorable William G. East, Senior U.S. District Judge for the District of Oregon.

Very truly yours,
Kim Schmidgall
Deputy Court Clerk to
Judge Lydick

Order Designating United States Circuit Judge and United States District Judges Pursuant to §2284, Title 28, United States Code [R. p. 342].

Whereas in my judgment the public interest so requires, I, pursuant to the provisions of §2284, Title 28, United States Code, do hereby designate and appoint the

HONORABLE WALTER ELY

United States Circuit Judge for the Ninth Circuit, and the

HONORABLE WARREN J. FERGUSON

United States District Judge for the Central District of California, and the

HONORABLE WILLIAM G. EAST

Senior United States District Judge for the District of Oregon, to hold district court for the Central District of California at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

Vincent Miranda, dba Walnut Properties, and Pussycat Theatre Hollywood, a California corporation, plaintiffs, vs. Cecil Hicks, District Attorney of the County of Orange, and Dudley D. Gourley, Chief of Police of the City of Buena Park, et al., Defendants, #73-2775-LTL, and all motions and proceedings therein.

If there be any objection to the membership of the court as constituted, a party shall file the objection within 14 days after the date of the filing of this order.

DATED: January 8, 1974.

Chief Judge, Ninth Circuit

IM

cc: Judge Ely
cc: Judge Ferguson
cc: Judge East
cc: Clerk, C.Cal.
cc: Clerk, 9 CA
cc: Clerk, Ore.

Affidavit in Support of Defendant's Motion to Dismiss [R. pp. 404-405].

[Caption Omitted in Printing]

AFFIDAVIT OF C. BRENT SWANSON IN SUPPORT OF DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Filed February 28, 1974

C. BRENT SWANSON, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the Orange County District Attorney's Office.

2. On January 29, 1974, proceedings were brought in the Municipal Court of the North Orange County Judicial District to suppress evidence and restore seized property in the case of *People of the State of California v. Edward Lee Bailey, et. al.*, No. NM 73-06675, the misdemeanor obscenity prosecution arising out of the seizures of the film "Deep Throat" at Plaintiff's theatre. In those proceedings the only evidence that was offered by either the People or the Defendants was a certified copy of each of the four search warrants, including the "Affidavit in Support of Search Warrant" and the "Return to Search Warrant". The essence of the Defendants' argument was that as the affidavits of the last three search warrants were identical, the seizures under these three warrants violated the procedural requirements set forth by the United States Supreme Court in *Heller v. New York,* 93 S.Ct. 2789. The

People replied in effect that this was not in fact the holding of *Heller,* and that under the facts before the Court the Defendants would have to present evidence in contravention of the affidavits before the presumption of validity which is accorded search warrants could be overcome. The Court, however, adopted the Defendants' position, and ordered the third and fourth copies of the film suppressed and returned to the Defendants.

3. On February 15, 1974, the People filed in the Municipal Court of the North Orange County Judicial District a "Notice of Appeal" and "Appellant's Proposed Statement of Facts" appealing from the Court's decision of January 29, 1974, ordering evidence suppressed and returned. The People also filed in that same Court on that date a "Notice of Motion and Motion to Reopen the Prior Ruling of the Court". The Court was requested by this motion to reopen the proceedings to suppress evidence and restore property for the purpose of making a determination of the obscene nature of the two copies of the film the Court had ordered returned to the Defendants. A certified copy of each of the above specified documents, as well as two pages of the Court's docket covering the applicable proceedings, is attached hereto and incorporated herein by this reference.

4. On February 26, 1974, the above People's "Motion to Reopen the Prior Ruling of the Court" was heard in the Municipal Court of the North Orange County Judicial District. The People argued that as the Court had not on January 29, 1974, made any de-

termination respecting the issue of obscenity it was not only appropriate but in fact required by a decision of the California Supreme Court to reopen the proceedings for that purpose. The Defendants took the position that the filing of the "Notice of Appeal" removed the Municipal Court's jurisdiction to grant the motion. The Court denied the People's motion, adopting the same position as the one taken by the Defendants, but conceded that the Superior Court would probably remand the case for a determination of the issue of obscenity at the time the People's appeal was heard.

Order Regarding Submission of the Merits of the Action [R. pp. 427-428].

Filed March 20, 1974

[Caption Omitted in Printing]

Before: Honorable Walter Ely, Circuit Judge, Honorable Warren J. Ferguson, District Judge.

PER CURIAM.

NOTICE IS GIVEN TO THE PARTIES HEREIN as follows:

1. The *Younger v. Harris* issue of bad faith harassment will be submitted to the three-judge court upon affidavits to be submitted by the parties hereto. (C.T. p. 426)

2. The *Miller v. California* issue will be submitted to the court without oral argument and upon brief and written statements in support and opposition.

3. All affidavits and briefs to be submitted by the plaintiffs shall be filed no later than April 3, 1974.

4. All affidavits and briefs of the defendants shall be filed no later than April 17, 1974.

5. Any reply briefs or affidavits of the plaintiffs shall be submitted no later than April 24, 1974.

6. On April 24, 1974 at 10:00 a.m. the cause will be submitted to the three-judge court without further argument or further proceedings. The court will not convene in person and counsel and parties need not appear.

IT IS FURTHER ORDERED that the clerk shall serve copies of this order by United States mail upon counsel for the parties appearing in this action.

Notice of Motion for Rehearing and for Relief From Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of That Motion (F.R.C.P. 59 (a), 59 (e), 60 (a), 60 (b), and (62) [R. p. 531].

Filed June 14, 1974

[Caption Omitted in Printing]

TO: PLAINTIFF AND ITS COUNSEL, DAVID M. BROWN OF FLEISHMAN, McDANIEL, BROWN & WESTON

PLEASE TAKE NOTICE that on July 1, 1974, at 10:00 A.M. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Warren J. Ferguson, United States District Judge, Courtroom No. 15, located at 312 North Spring Street, Los Angeles, California, Defendants GOURLEY, FONTECCHIO, HAFDAHL and HARRISON will move the Court for rehearing and for relief from Judgment and to amend and alter Judgment and to correct errors in the Judgment and record and to stay Judgment pending determination of this Motion, pursuant to Rules 59 (a), 59 (e); 60 (a), 60 (b), and 62 of the Federal Rules of Civil Procedure. The Court will be asked to set aside the Findings of Fact and Conclusions of Law and Judgment heretofore entered in that the Court erred in its ruling, the Judgment is contrary to law, and the Court made errors of fact and its Findings which should be corrected.

Notice of Motion for Relief From Judgment, for Rehearing, and for Stay of Judgment Pending Determination of That Motion [R. p. 533A].

Filed June 14, 1974

[Caption Omitted in Printing]

TO: PLAINTIFF AND ITS COUNSEL, DAVID M. BROWN OF FLEISHMAN, McDANIEL, BROWN & WESTON

PLEASE TAKE NOTICE that on July 1, 1974, at 10 a.m. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Warren J. Ferguson, United States District Judge, Courtroom No. 15, located at 312 North Spring Street, Los Angeles, California, Defendants CECIL HICKS and ORETTA SEARS will move the court for relief for judgment, for rehearing and for a stay of judgment pending determination of this motion, pursuant to Rules 60b and 62 of the Federal Rules of Civil Procedure. Said motion will be made on the Points and Authorities attached hereto and on all points and authorities, pleadings and exhibits heretofore filed in this matter.

(a) Municipal Court Complaint (Attachment (A) to Motion for Relief From Judgment) [R. p. 574].

In the Municipal Court of North Orange County Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, vs. Edward Lee Bailey 12/22/46, James Samuel Lytell 1/26/43, Walnut Properties, Inc/Vincent Miranda, John Doe I, John Doe II, Defendant(s) No. NM73-6675 amended.

* * *

COMPLAINT—CRIMINAL
MISDEMEANOR

The undersigned hereby certifies, upon information and belief: COUNT V: That on or about the 23rd day of November, 1973, at and within North Orange County Judicial District, Orange County, California, the crime of Misdemeanor, to-wit: Violation of Section 311.2 of the Penal Code was committed by EDWARD LEE BAILEY, JAMES SAMUEL LYTELL, WALNUT PROPERTIES, INC/VINCENT MIRANDA, JOHN DOE I and JOHN DOE II who at the time and place last aforesaid, did then and there willfully and unlawfully and knowingly exhibit, distribute or offer to distribute or have in their possession with intent to distribute or to exhibit or offer to distribute, obscene matter, to-wit: a 35 mm film entitled "Deep Throat."

* * *

Wherefore, and based upon the declaration attached, said complainant prays that a warrant may be issued for the arrest of EDWARD LEE BAILEY, JAMES SAMUEL LYTELL, WALNUT PROPERTIES, INC/ VINCENT MIRANDA, JOHN DOE I, and JOHN DOE II and that they be dealt with according to law. I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 9, 1974

.....

Complainant

Place of Execution:
Orange County, California

* * *

Order Re Hearing on Motions
Filed June 24, 1974 [R. pp. 597-8].

[Caption Omitted in Printing]

Before: Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The motions of the defendants filed June 14, 1974 and scheduled for hearing on July 1, 1974 will be submitted and determined without oral hearing upon brief written statements of reasons in support and opposition pursuant to Rule 78 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Clerk serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.

Dated this 24th day of June, 1974.

Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Affidavit of David Brown in Partial Opposition to Stay.

Filed June 17, 1974 [R. pp. 594-595]

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am a member of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, attorney of record for Plaintiffs herein.

2. Defendants have moved for relief from judgment and for rehearing, and have noticed their motions for July 1, 1974. In connection with these post-trial motions, Defendants also have applied for a temporary stay of the judgment pending determination of the motions.

3. The judgment entered by this Court on June 4, 1974, included an order that Defendants return to Plaintiffs certain property seized from Plaintiffs' theater. Among the property seized was four complete prints of the film "Deep Throat."

4. Defendants contend that return of all four copies of the film would "effectively terminate" a pending state court criminal prosecution alleging violation of the California obscenity statute by exhibition of the said film at Plaintiffs' theater.

5. In connection with pretrial motions made in the Orange County misdemeanor prosecution, I, acting as counsel for the defendants in that case, stipulated with the prosecution that for purposes of trial, all four prints

of the film would be deemed identical. Accordingly, the prosecution requires but one copy of the film for the possible future trial of the criminal case.

6. Plaintiffs herein do not oppose the granting of a stay of judgment which would permit Defendants to retain one copy of the film pending a determination of Defendants' post-trial motions, and pending appeal, should an appeal be taken. Plaintiffs do oppose Defendants' application for a stay of judgment in all other respects.

* * *

Application for Order to Show Cause in Re Contempt.

Filed August 3, 1974

(Caption omitted in printing)

COME NOW, VINCENT MIRANDA doing business as WALNUT PROPERTIES, and PUSSYCAT THEATRE-HOLLYWOOD, a California corporation, Plaintiffs in the above-entitled action, and respectfully apply for the following:

1. For a Temporary Restraining Order, a Preliminary Injunction, and a Final Injunction, requiring the Defendants to deliver forthwith to Plaintiffs all prints of the motion picture film "Deep Throat," and all prints of the motion picture film "Devil In Miss Jones," which have been seized by said Defendants from Plaintiffs' motion picture theatre in the City of Buena Park, California, which seizures occurred subsequent to July 29, 1974, and restraining Defendants from any further seizures of copies of the said films from Plaintiffs' theatre.

2. For a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction, restraining Defendants from commencing or carrying on any criminal prosecutions against Plaintiffs or their employees pursuant to California Penal Code §311, et seq.

3. For an Order to Show Cause why the Defendants, and each of them, should not be found in contempt of this Court for failing and refusing to return to Plaintiffs four previously seized copies of the said motion picture film "Deep Throat," which this Court previously ordered said Defendants to return to Plaintiffs by judgment entered on June 4, 1974, which judgment was served on Defendants, and each of them, and of which judgment Defendants, and each of them, had actual notice.

4. For an Order to Show Cause why Defendants should not be required to pay damages to Plaintiffs for such contempt; and

5. For such other and further relief, including assessment of attorneys' fees and expenses, as the Court deems just, on the ground that Defendants, their agents and employees, and other persons in active concert and participation with said Defendants, wilfully, knowingly and intentionally disregarded and violated the order and judgment issued by this Court on June 4, 1974.

The grounds for this Application are set forth in the accompanying Affidavit of DAVID M. BROWN in support of this Application.

(a) Affidavit of David M. Brown in Support of Application in Re Contempt.

Filed August 3, 1974

State of California, County of Los Angeles—ss.

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the firm of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, attorney of record for Plaintiffs herein.

2. I am familiar with the history of the instant litigation and make the following statements based on my personal knowledge, except for those statements which I make pursuant to my information and belief.

3. On June 4, 1974, this Court entered its judgment against Defendants in this action, which judgment contained the following provisions:

"1. The California obscenity statute, Penal Code §§311, et seq., are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California*, 413 U.S. 15 (1973).

"2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

"The Court retains full and complete jurisdiction over the parties and the causes of action for all purposes."

4. A copy of said judgment was duly served upon Defendants, through their attorneys of record, by the Clerk of this Court through the United States mail. I am informed and believe, and thereupon state, that the Defendants, and each of them, have had actual notice of the said judgment by means of conversations that I have had with Deputy District Attorneys C. Brent Swanson, Michael Cappizzi, and John Conley, all of the Orange County District Attorney's Office.

5. The papers heretofore filed in this action show that the property ordered returned to Plaintiffs in this Court's judgment of June 4, 1974, included four prints of the motion picture film "Deep Throat."

6. Notwithstanding the foregoing, Defendants have wholly failed and neglected to obey, comply with and carry out the provisions and requirements of such judgment, and have wrongfully refused so to do.

7. The refusal of Defendants to obey said judgment is calculated to impair, defeat, impede and prejudice the rights of the Plaintiffs, in the following particulars:

(a) On June 6, 1974, I sent a letter by messenger to Defendant CECIL HICKS demanding the return, pursuant to this Court's judgment of June 4, 1974, of four prints of the film "Deep Throat," stating that "We expect the above property to be returned pursuant to the Court's judgment no later than 5:00 P.M. on June 7, 1974. Please inform me of the location where the property may be obtained." [A copy of the said letter is attached hereto as Exhibit "A"].

(b) On June 18, 1974, I sent a letter to Defendant CECIL HICKS, to the attention of John D. Conley, Deputy District Attorney, stating the following:

"On June 6, 1974, I wrote a letter which was handcarried that date to Mr. Hicks requesting immediate compliance with that part of the judgment in the above case ordering the Defendants to return to Plaintiffs certain property seized from Plaintiffs' theater on November 23 and 24, 1973, consisting in part

"Subsequently, your office informed my office that Defendants declined to return the property since an application for stay of judgment was being prepared.

"On June 15, 1974, we received your notice of motion for relief from judgment, for rehearing, and for stay of judgment pending determination of that motion.

"It appears, however, that the application for stay of judgment will not be heard by the Court since the application is not in proper form. Accordingly, the Court's judgment has not been stayed and Plaintiffs demand forthwith compliance with the judgment.

"You have expressed the concern of the Defendants that the state misdemeanor prosecution concerning the exhibition of 'Deep Throat' not be mooted pending possible appeal. It appears that this concern could be met fully by your making copies of the seized films. Plaintiffs would not object to the use of such copies on 'best evidence' *grounds,* but would of course not waive any other objection to the legality or illegality of the seizures. Alternatively, in order to expedite compliance with the judgment, we would not object to Defendants' post-trial motions, and pending appeal if an appeal is taken. Again, we would so agree without waiving any of the legal and constitutional claims raised in this action and in the state criminal prosecution.

"Your immediate attention to this matter will be appreciated." [A copy of the said letter is attached hereto as Exhibit "B"].

(c) To date, I have received no response to the aforesaid letter of June 18, 1974. To date, Defendants have not returned any of the four prints of the film "Deep Throat" to Plaintiffs, despite the fact that no stay, modification or other alteration of this Court's judgment of June 4, 1974 has been obtained by Defendants from this Court, or any other court to which Defendants might have applied for a stay, modification or alteration of the said judgment.

(d) In its Memorandum Opinion dated June 4, 1974, this Court stated:

". . . The objective facts set forth in the first part of this opinion clearly demonstrate the bad faith and harassment which would justify federal intervention. . . . It is sufficient to note that the pattern

of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie 'Deep Throat' out of Buena Park." [Memorandum Opinion, p. 16].

(e) Notwithstanding the foregoing finding of bad faith and harassment based upon the Defendants' conduct in seizing multiple copies of the same film from Plaintiffs' theater, and notwithstanding the failure of Defendants to return any of the four prints of the film "Deep Throat" previously seized from Plaintfffs' theater, Defendants have, commencing on July 29, 1974, seized three additional prints of the film "Deep Throat" from Plaintiffs' theater, and have seized two copies of the film "Devil In Miss Jones" from Plaintiffs' theater.

(f) I am informed and believe and thereupon state, that on July 29, 1974, at approximately 5:00 P.M., police officers of the City of Buena Park, including RICHARD HAFDAHL, a named Defendant herein, and C. BRENT SWANSON, Deputy District Attorney of the County of Orange, seized from Plaintiffs' theater, pursuant to the purported authority of a search warrant, a print of the film "Deep Throat," and other materials. A copy of the said search warrant is attached hereto as Exhibit "C". At the same time, I am informed and believe, the officers seized a copy of the film "Devil In Miss Jones" from Plaintiffs' theater, pursuant to the purported authority of a search warrant attached hereto as Exhibit "D".

(g) I am informed and believe and thereupon state, that on July 30, 1974, at approximately 3:00 P.M., officers of the Buena Park Police Department, including Defendant HAFDAHL, seized an additional print

of the film "Deep Throat" from the Plaintiffs' theater. I am further informed and believe and thereupon state, that the manager of Plaintiffs' theater, a Mr. Woods, was physically arrested upon a charge of violating the state obscenity statute, was taken to jail, and released after posting bail.

(h) I am informed and believe and thereupon state, that on July 31, 1974, at approximately 1:00 P.M., the said Buena Park police officers seized another print of the film "Deep Throat" from Plaintiffs' theater, bringing to seven the total number of prints in the possession of the Defendants herein. I am further informed and believe and thereupon state that at the same time, the said officers seized a second print of the film "Devil In Miss Jones" from Plaintiffs' theater.

(i) It is my opinion, based upon all of the foregoing, that it is the intention of the Defendants to continue to seize all copies of the film "Deep Throat" and all copies of the film "Devil In Miss Jones" exhibited at Plaintiffs' theater, so long as the said films continue to be exhibited, and until their exhibition has been finally suppressed.

* * *

(b) Exhibit A in Support of Application.

June 6, 1974

CECIL HICKS, District Attorney
700 Civic Center Drive West
Santa Ana, California 92701

Re: Miranda v. Hicks
U.S.D.C. C.D. Cal. Civ. No. 73-2775-F

Dear Mr. Hicks:

On June 4, 1974, the Court in the above-entitled action filed its judgment which provides in part that:

> "The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park, California."

The property referred to consists of four complete prints of the motion picture "Deep Throat" and related advertising material and records.

We expect the above property to be returned pursuant to the Court's judgment no later than 5:00 P.M. on June 7, 1974. Please inform me of the location where the property may be obtained.

Your cooperation will be appreciated.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON

By .....

David M. Brown, Attorney for
Vincent Miranda dba Walnut
Properties and Pussycat Theatre-
Hollywood

DMB/tj

LETTER HAND CARRIED JUNE 6, 1974

bcc: Vincent Miranda

(c) Exhibit B in Support of Application.

June 18, 1974

CECIL HICKS, District Attorney
P.O. Box 808
Santa Ana, California 92701

Attention: JOHN D. CONLEY, Deputy District Attorney

Re: Miranda v. Hicks
No. 73-2775-F

Dear Mr. Conley:

On June 6, 1974, I wrote a letter which was handcarried that date to Mr. Hicks requesting immediate compliance with that part of the judgment in the above case ordering the Defendants to return to Plaintiffs certain property seized from Plaintiffs' theater on November 23 and 24, 1973, consisting in part of four complete prints of the film "Deep Throat."

Subsequently, your office informed my office that Defendants declined to return the property since an application for stay of judgment was being prepared.

On June 15, 1974, we received your notice of motion for relief from judgment, for rehearing, and for stay of judgment pending determination of that motion.

It appears, however, that the application for stay of judgment will not be heard by the Court since the application is not in proper form. Accordingly, the Court's judgment has not been stayed and Plaintiffs demand forthwith compliance with the judgment.

You have expressed the concern of the Defendants that the state misdemeanor prosecution concerning the exhibition of "Deep Throat" not be mooted pending possible appeal. It appears that this concern could be met

fully by your making copies of the seized films. Plaintiffs would not object to the use of such copies on "best evidence" grounds, but would of course not waive any other objection to the legality or illegality of the seizures. Alternatively, in order to expedite compliance with the judgment, we would not object to Defendants retaining one of the four prints of the film pending determination of Defendants' post-trial motions, and pending appeal if an appeal is taken. Again, we would so agree without waiving any of the legal and constitutional claims raised in this action and in the state criminal prosecution.

Your immediate attention to this matter will be appreciated.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON

By

David M. Brown

DMB/tj

(d) Exhibit C in Support of Application.

In the Superior Court of the State of California, in and for the County of Orange.

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Proof, by affidavits, having been made this day before me by THOMAS HAFDAHL, and having personally viewed the movie entitled, "DEEP THROAT", and after personally reading and considering the opinion in the cases of: *Miranda v. Hicks,* Civil No. 73-2775-F, rendered on June 4, 1974, by the United States District Court, Central District and *Miller v. California,* No. 73-1508, rendered on July 25, 1974 by the United States Supreme Court, and after reviewing the transcript of the Adversary Hearing had before me on November 27 and 28, 1973, and my finding that the movie is obscene made at that hearing, I find that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision 3 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED *Between the hours of 7 a.m. and 10 p.m.,* good cause being shown therefor, to make search of the premises located at and described as:

The Pussycat Theater, 6177 Beach Blvd., Orange County, California, a commercial movie theater showing films for public view in a light brown stucco building on the West side of Beach Blvd., between Commonwealth and Artesia Avenues. The area to be searched includes, but is not limited to: The lobby, business offices, exterior and interior display cases, projector room, and general theater premises;

for the following personal property, to-wit: *All reels of 35 MM film and canisters holding same, for the*

film entitled, "DEEP THROAT". Items to be seized include, but are not limited to: All posters, signs, advertisements, or other writings which promote, advertise, etc., the viewing or contents of the above-named film. All documents, papers, bills, receipts, business records, directives, memorandums, etc., tending to show what persons are responsible for the promotion, management, exhibition or ordering of the above-described film;

and if you find the same or any part thereof, to bring it forthwith before me at the Superior Court of the State of California, for the County of Orange, pursuant to Section 1536 of the Penal Code.

Given under my hand this 29th day of July, 1974.

Byron K. McMillan
Judge of the Superior Court

(Search Warrant)

(4) Reels of Deep Throat in cardboard box, misc. papers and memorandum. 2 time schedules

7-29-74 1725 hrs.

/s/ Sgt. Hafdahl

(e) Exhibit D in Support of Application.

In the Superior Court of the State of California, in and for the County of Orange.

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Proof, by affidavit, having been made this day before me by DAVID WILLIAMS, I find that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision(s) 3 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED *between the hours of 7 a.m. and 10 p.m.* good cause being shown therefor, to make search of the premises located at and described as: *The Pussycat Theater, 6177 Beach Blvd., Orange County, Buena Park, California, a commercial movie theater showing films for public view in a light brown stucco building on the west side of Beach Blvd., between Commonwealth and Artesia Avenues. The area to be searched includes, but is not limited to: the lobby, business offices, exterior and interior display cases, projector room, and general theater premises;*

for the following personal property, to-wit: *One (1) complete copy of 35mm film and canisters holding same, for the film entitled "DEVIL IN MISS JONES." Items to be seized include, but are not limited to: All posters, signs, advertisements, or other writings which promote, advertise, etc., the viewing or contents of the above*

described film. All documents, papers, bills, receipts, business records, directives, memorandum, etc. tending to show what persons are responsible for the promotion, management, exhibition, or ordering of the above described film;

and if you find the same or any part thereof, to bring it forthwith before me at the Superior Court of the State of California, for the County of Orange, pursuant to Section 1536 of the Penal Code.

Given under my hand this 29th day of July, 1974.

Byron K. McMillan
Judge of the Superior Court

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

MICHAEL R. CAPIZZI, Assistant District Attorney
BY: ORETTA D. SEARS, Deputy District Attorney
Post Office Box 808
Santa Ana, California 92702
Telephone: (714) 834-3600
Attorneys for Plaintiff

Order of Seizure After Adversary Hearing.

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda dba Pussycat Theater, Walnut Properties, Inc., et al., Defendants. No. M-2248.

Filed: Aug. 2, 1974.

THE PEOPLE OF THE STATE OF CALIFORNIA:
TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Pursuant to an affidavit duly subscribed and sworn before me, a search warrant for the theater located at 6177 Beach Boulevard, Buena Park, having been duly issued by this Court ordering the seizure of the film "Devil in Miss Jones" as better described in said search warrant and affidavit which are incorportated by reference as though fully set forth herein, and the defendants by order of this Court having appeared by counsel, to show cause why all copies of said film presently remaining in the above-named theater should not by this Court hearing at which both the People and the defendants were given full opportunity to present evidence having been had and defendants having declined to argue the issue of obscenity or non-obscenity of said film, the Court having viewed the film and heard the evidence presented, and having duly found that the above-named film as well as all copies thereof contained in the 6177 Beach Boulevard Theater: (a) are held for the purpose of exhibition, (b) are obscene beyond any reasonable doubt, (c) are matter defined

by *In re Cianini* as footnote 8 material, and (d) that said material shall leave the jurisdiction of the Court and/or be shown unless seized.

You are therefore commanded between the hours of 7:00 a.m. and 10:00 p.m. to seize all copies without regard to film millimeter size of the above-named film entitled "Devil in Miss Jones" located at 6177 Beach Boulevard, Buena Park, and to deposit the same under the sole and exclusive dominion and control of this court pursuant to Section 1536 of the Penal Code.

It is so ordered.

Given under my hand this 2nd day of August, 1974.

/s/ Byron K. McMillan
BYRON K. McMILLAN
JUDGE OF THE SUPERIOR COURT

This instrument is a correct copy of the original on file in this office
Attest: Aug. 2, 1974
WILLIAM E. ST JOHN
County Clerk and Clerk of the Superior Court of the State of California in and for the County of Orange
BY /s/ Ellen D. Santucci, Deputy

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA
MICHAEL R. CAPIZZI, Assistant District Attorney
BY: ORETTA D. SEARS, Deputy District Attorney

Post Office Box 808
Santa Ana, California 92702
Telephone: 834-3600
Attorneys for Plaintiff

Order of Seizure After Adversary Hearing.

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda, dba Pussycat Theater, Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson, and Jesse Lee Crabtree, Defendants. No. M 2248.

Filed: Aug. 2, 1974.

Pursuant to an affidavit duly subscribed and sworn before me, and having personally viewed the material described, a search warrant for the theater located at 6177 Beach Boulevard, Buena Park, having been duly issued by this Court ordering the seizure of the film "DEEP THROAT" as better described in said search warrant and affidavit which are incorporated by reference as though fully set forth herein, and the defendants by order of this Court having appeared and represented by counsel, to show cause why all copies of said film presently remaining in the above-named theater should not by this Court be declared obscene and ordered seized and a hearing at which both the People and Defendants were given full opportunity to and did present evidence and argue the matter both as to the issue of obscenity and as to the validity of the seizure. The Court on the evidence presented at said hearing, having duly found that the above named film as well as all copies thereof contained in the 6177 Beach Boulevard Theater: (A) are held for the purpose of exhibition, (B) are obscene beyond any reasonable doubt, (C) are matter defined by *In re Gianini* as footnote 8 material and (D) that said material shall leave the jurisdiction of the Court and/or be shown unless seized.

You are therefore commanded between the hours of 7:00 a.m. and 10:00 p.m. to seize all copies of the above named 35 mm film "DEEP THROAT" presently located at 6177 Beach Boulevard, Buena Park and to deposit the same under the sole and exclusive dominion and control of this court pursuant to Section 1536 of the Penal Code.

It is so ordered.

Given under my hand this 28th day of November, 1973.

/s/ Byron K. McMillan
BYRON K. MCMILLAN
JUDGE OF THE SUPERIOR COURT

Handwritten insertion at line 15: and any copies of the film Deep Throat which may be delivered or found there on any future date. The court hereby reaffirms and reissues this order—31 July '74. Byron K. McMillan, 2 Aug '74.

Supplemental Points and Authorities in Support of Defendants' Motion for Relief From Judgment and for Rehearing.

In the United States District Court, Central District of California.

Vincent Miranda, et al., Plaintiffs, vs. Cecil Hicks, et al., Defendants. Civil Action No. 73-2775-F.

Filed: July 30, 1974.

ARGUMENT

THE JULY 25, 1974, DECISION ISSUED BY THE UNITED STATES SUPREME COURT IN MARVIN MILLER V. STATE OF CALIFORNIA, No. 73-1508, HAS DETERMINED THAT THE CALIFORNIA OBSCENITY LAWS ARE CONSTITUTIONAL.

On July 25, 1974, the United States Supreme Court issued its decision in the case of *Marvin Miller v. State of California,* No. 73-1508. A copy of the opinion is attached hereto, incorporated by reference and labeled Attachment A.

The majority opinion states:

> The appeal is dismissed for want of a substantial federal question.

The dissent written by Mr. Justice Brennan recites that:

> Appellant was convicted in the Orange County, California Superior Court of distributing obscene matter in violation of California Penal Code §311.2. . . .

Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., 71 Cal.2d 1215, 1221, fn. 4 [81 Cal.Rptr. 251, 459

P.2d 667]; Wright, Law of Federal Courts, 495; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review,* 64 Colum.L.Rev. 1, 11 and of value as precedent under the doctrine of *stare decisis. (Ohio ex rel. Eaton v. Price, supra; Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra; People v. United National Life Ins. Co.,* 66 Cal.2d 577, 591 [58 Cal.Rptr. 599, 427 P.2d 199]; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 179 F.Supp. 944, 949, fn. 4 [revd. on other grounds, 366 U.S. 582 (6 L.Ed.2d 551, 31 S. Ct. 1135)].)

As pointed out by *Ahern v. Murphy,* 457 F.2d 363, the conclusion of its binding precedent value is inescapable in that where a decision of a state court is based on a criminal state statute, the *only* ground for appellate jurisdiction in the United States Supreme Court is an allegation under 28 U.S.C. & 1257(2) that:

> There is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Quite clearly a dismissal for want of a substantial federal question comports with it a finding that jurisdiction in the United States Supreme Court exists by virtue of a claim of alleged invalidity and a ruling that the claim of invalidity lacks merit.

After setting forth the text of the California obscenity statutes, the dissent goes on to recite:

> The Appellate Department of the Superior Court affirmed, and this Court vacated the judg-

ment of that court and remanded the case for reconsideration in light of *Miller v. California,* 413 U.S. 15 (1973), and companion cases. The Appellate Department again affirmed.

In context the decision, therefore, makes clear that this is a conviction under the California obscenity statute reconsidered and reaffirmed by a California court in light of the *Miller v. California, supra,* requirements of specificity. A dismissal of the appeal "for want of a substantial federal question" under the circumstances is a decision on the merits, determinative of the constitutionality of the California obscenity legislation as interpreted by the California Appellate Courts. This fact is pointed out in *Eaton v. Price,* 360 U.S. 246, 3 L.Ed.2d 1200, 1203, where the Court concludes:

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .

Such a determination on the merit, of course, makes the case controlling as precedent. (See *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 [3 L.Ed.2d 1200, 1202, 79 S.Ct. 978] [opinion of Brennan, J.]; *Ahern v. Murphy* (7th Cir. 1972) 457 F.2d 363, 365.

Accordingly and for all the above reasons, Defendants respectfully urge this Honorable Court to deny Plaintiffs' request for costs and/or attorney's fees because moot, to vacate its prior judgment declaring the California Obscenity Statutes to be unconstitutional, ordering certain evidentiary items returned to Plaintiffs, and awarding costs to the Plaintiffs, and respectfully urges the Court to enter an order dismissing Plaintiffs' complaint.

Affidavit of Oretta D. Sears in Support of Answer to Order to Show Cause in Re Contempt.

Filed on August 9, 1974

* * *

On June 14, 1974, motions for relief from judgment to amend and alter judgment and to correct errors in the judgment was filed by Defendants Hicks and Sears. Motions to amend, vacate, stay, etc. pursuant to Federal Rules of Civil Procedure, sections 59(a) and (d), 60(a) and (b) and 62 were filed by defendants Gourley, Fontecchio, Hafdahl and Harrison. A motion to stay the proceedings was also filed on that date.

On or about June 14, 1974, the Plaintiffs resumed showing of the film "Deep Throat" and of other similar films which continued from that date to July 29, 1974.

On July 25, 1974, the United State Supreme Court issued its opinion in *Miller v. California,* dismissing the appeal "for want of a substantial federal question."

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of the seizures, acknowledged that a valid adversary hearing on the issue of obscenity had been had and declared the four copies to be contraband.

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Superior Court that "Deep Throat" was still being shown and asked whether the court wished to issue a new warrant for its seizure. The court issued the search warrant ordering the seizure of the movie "Deep Throat." This search warrant and affidavits in support thereof thereto attached as Attachment B.

On that same date upon affidavit duly sworn to by Officer Williams, a search warrant ordering the seizure of "Devil in Miss Jones", was issued and seizure made pursuant thereto (See Attachment C).

The seizures of "Deep Throat" alleged to have occurred on July 30 and 31 were made pursuant to reissued and revalidated warrants (See Attachment D).

The second copy of "Devil in Miss Jones" allegedly seized on July 31, 1974, was seized pursuant to search warrant issued in conjunction with an order to show cause requesting Plaintiff to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at defendant's request, and show cause why all copies in the possession of the theatre should not be seized. The warrant further provided that if defendants had no additional copies available for showing, the second copy would be returned pending the Friday hearing (See Attachment E).

[As to each seizure, state criminal complaints have been filed and are pending. In each of the above instances, the copies seized were placed in the court's custody as ordered.] On Friday, August 2, 1974, Mr. Brown appeared at the hearing. He stated that he did not believe the state court had jurisdiction to hold the hearing and when the court declared itself ready to proceed on the merits, the attorney walked out of the courtroom. The state court viewed the movie, heard evidence and issued its order of seizure for all copies of the film in the theatre's possession (See Attachment F).

On August 1, 1974, a message was left with Defendant Sears which stated that Mr. Brown had an appointment with Judge Ferguson for 10:00 a.m. on

Saturday morning, August 3, 1974, and that he would request an order (unspecified) at that time. On August 2, 1974, when Mr. Brown's associate appeared in the state court, no service was made of any type and nothing was said about the Saturday appointment to Defendant Sears.

On Saturday, August 3, 1974, the Court issued its order to show cause in re contempt and *in re* preliminary injunctions, and to return property. Defendant Sears was served personally with the order to show cause and temporary restraining order on Saturday, August 3. However, she was never personally served with the application for the order to show cause and Mr. Brown's affidavits in support thereto although she was able to secure a copy of those documents during the afternoon of Monday, August 5, 1974.

* * *

Supplemental Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Before Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The defendants have filed appropriate motions to amend the judgment in this case which was filed June 4, 1974.

They allege that: (1) this court was factually in error when it held that the plaintiffs were not defendants in a criminal prosecution; (2) the judgment is contrary to the holding of the Supreme Court in *Hamling v. United States*, ... U.S. ...., 42 U.S.L.W. 5035 (U.S. June 24, 1974); and (3) the injunctive part of the judgment should be modified because (a) the money seized has been returned to the plaintiffs and (b) the films are under the custody of the Municipal Court which is not a party to these proceedings.

I

The first issue is one of serious consequence, for it goes to the heart of the court's reasoning on the issue of abstention. The court bottomed its decision on the abstention issue on the fact that no criminal proceedings had been instituted in state court against the plaintiffs by the date on which they filed their complaint in this court.

The evidence submitted by the defendants here reveals the following:

1. On the date of the filing of the complaint in this case, November 29, 1973, there was pending in the state municipal court an 8-count misdemeanor complaint against Edward Lee Bailey and James Samuel Lytell in connection with the exhibition of "Deep Throat" in Buena Park.

2. Copies of that complaint were furnished this court on December 3, 1973.

3. Neither Mr. Bailey nor Mr. Lytell are parties to this action.

4. The complaint in this action was served upon the District Attorney of Orange County by a deputy United States marshal on January 14, 1974; the other defendants had been served a few days before.

5. On January 15, 1974, a day after that service, the criminal complaint in the state municipal court was amended by the District Attorney of Orange County to include Vincent Miranda and Walnut Properties, Inc., plaintiffs in this action.

6. The defendants rely on the amended state criminal complaint and urge abstention.

The operation of the abstention doctrine when criminal charges are pending is outlined in a trilogy of cases decided in 1971: *Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); and *Perez v. Ledesma,* 401 U.S. 82 (1971). In each of those cases, a criminal indictment or information had been filed against the plaintiff *before* a complaint was filed in the federal district court. When no criminal charge is pending, however, the case is governed by the doctrine of *Steffel v. Thompson,* ..... U.S. ....., 42 U.S.L.W. 4357 (U.S. March 19, 1974). There, the Court noted:

> When no state criminal proceeding is pending at the time the federal complaint is *filed,* federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. . . . 42 U.S.L.W. at 4360 (emphasis added.)

It is clear that for purposes of the abstention doctrine, a determination of whether there is an "ongoing state criminal prosecution" against the plaintiff is measured as of the time of the filing of the complaint in federal court. The fact that the defendants filed criminal charges against the plaintiff after the instant case was under consideration does not alter this court's duty to decide the controversy before it.

Furthermore, the later criminal charges would seem to supply added justification for action by the court. The Chief Justice, in a recent and extensive separate opinion, commented about the burdens and possible ramifications of *Younger v. Harris.* See *Allee v. Medrano,* 42 U.S.L.W. 4736 (U.S. May 20, 1974) (Burger, C. J., concurring in part and dissenting in part.) He there noted that inferences of bad faith can arise

from the common activity of the prosecutors and the police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction. While the strict requirements of *Younger* are only of tangential relevance to the prior opinion of this court, the evidence brought to light by the petition for rehearing only serves to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the couse of action revealed in the latest petition.

No explanation is given why criminal charges were not instituted against the plaintiffs here until after the filing and service of the complaint in this action. Without such an explanation it is reasonable for the court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court. That conclusion surely removes this case from the abstention doctrine of *Younger* and *Mackell.*

II

Defendants have requested that this court reconsider its holding in light of the recent decision of the Supreme Court in *Hamling v. United States,* ..... U.S. ....., 42 U.S.L.W. 5035 (U.S. June 24, 1974). There, the Court upheld the constitutionality of a *federal* statute which prohibits the mailing of obscene matter, holding that the statutory language as construed met the specificity test of *Miller v. California,* 413 U.S. 15 (1973). More exactly, Justice Rehnquist referred to footnote 7 of *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123, 130 (1973) as authority for the construction the Court offered in *Hamling;* i.e., that the

terms "obscene", etc., include the specific "hard-core" matter as described in *Miller* at 25:

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

See 42 U.S.L.W. at 5043. That such a construction would be possible was noted by this court in its original opinion; there is nothing in *Hamling v. United States* to suggest that the Supreme Court there did anything more than exercise its authority to construe fedral statutes, an authority alluded to in that same footnote 7 of *12 200-ft. Reels.* See *United States v. Thirty-seven Photographs,* 402 U.S. 363 (1971); compare the dissenting opinion of Black, J., *id.* at 384.

More importantly, there is nothing in *Hamling* which would lead this court to believe that the specificity requirements of *Miller* have been overruled. The tenets of *Miller* have not been met, either by the California statute on its face or as construed, either pre-*Miller* or in *Enskat*. There has been no construction by the California courts of an obscenity standard based upon specific acts, nor any formulation comparable to that added to the federal statute in *Hamling*. The Supreme Court in *Hamling,* in fact, points out in detail the infirmity of *Enskat*. In *Hamling* the Court set forth with regard to the federal statute a specific jury instruction which meets the specificity test of *Miller*. However, no such specific instruction is found in *Enskat,* nor can one be inferred. Nothing in that opinion contains language from which an instruction to a jury could be

drawn as to what specific conduct may be constitutionally proscribed.

This court is also faced with the recent dismissal by the Supreme Court of *Miller v. California,* ..... U.S. ....., 42 U.S.L.W. 3711 (U.S. July 25, 1974) (Miller II), "for want of a substantial federal question." When *Miller v. California,* 413 U.S. 15 (1973) (Miller I) was decided in the 1973 term of the Court, the case itself was remanded to the state courts in light of the new obscenity standards developed therein. Upon remand, the case was reaffirmed by the Appellate Department of the California Superior Court of Orange County with the following notation: "affirmed, *People v. Enskat* (1973) 33 Cal.App. 3d 900". *People v. Enskat* was docketed with the Supreme Court sub nom. *Enskat v. California;* the writ of certiorari in that discretionary appeal was denied. 42 U.S.L.W. 3712 (U.S. July 25, 1974).

Enskat is the case discussed and analyzed in the original opinion in this case. The denial of the writ of certiorari in that case does not operate as a decision on the merits. See *Polites v. United States,* 364 U.S. 426, 433 n. 9 (1960); *United States v. Shubert,* 348 U.S. 222, 228 n. 10 (1955). The appeal in *Miller,* however, was taken under 28 U.S.C. § 1257(e) as an appeal of right. This court must now ascertain whether the summary action in Miller II operates as a decision on the merits of the challenge to the constitutionality of the California obscenity statute.

The question is one which has led to commentary by many of this country's preeminent Federal Jurisdiction and Constitutional Law scholars. Professor Bickel would characterize a dismissal for lack of a substantial federal

question as a refusal by the Court to exercise its jurisdiction; a reflection of pragmatic considerations and institutional expediency, but not necessarily a decision on the merits. A. Bickel, *The Least Dangerous Branch* (1962). Professor Wechsler, however, feels that the Court should not have the option to decide or reject those cases before it on appeal as of right. H. Wechsler, *Towards Neutral Principles of Constitutional Law* (1961). Professor Gunther sides with the antidiscretion forces, terming those instances in which the Court has clearly ducked a substantial federal question as "aberrations." Gunther, *The Subtle Vice of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 4 Colum. L. Rev. 1, 12 (1964).

Defendants have mistakenly asserted that Justice Brennan's separate opinion in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959) forecloses the question and definitely establishes that such a dismissal is on the merits. Justice Brennan was not there speaking for the Court, which itself had done no more than note probable jurisdiction of the case on the basis of a 4-4 vote. Rather, he was expressing his personal displeasure at the decision of four of his colleagues to make known the reason for their votes against noting jurisdiction. His statement was, therefore, no more than one justice's passing comments on an issue not before the Court.

It should be noted tangentially that quite a different issue arises when, after deliberation, the Court affirms a decision below by a 4-4 vote, as happened after oral argument in the *Eaton* case. 364 U.S. 263 (1960). Because of lack of agreement by a majority of the Court, many people, including Justice Brennan, feel that such affirmances, while binding on the parties, have no

value as precedent. See 364 U.S. at 264; *United States v. Plink*, 315 U.S. 203, 216 (1942); *Hertz v. Woodman*, 218 U.S. 205, 212-14 (1910).

Thus this court can do no more than take note of Justice Brennan's statement on the dismissal question, and perhaps contrast it with the apparent thrust of Justice Harlan's dissent in *Redrup v. New York*, 386 U.S. 767, 771 (1967) at 772, in which he seemed to embrace the Bickel view and equate dismissal of a writ of certiorari as improvidently granted with a dismissal of an appeal for want of a substantial federal question. More recently, Justice Rehnquist, writing for the Court in *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974), suggested that a summary affirmance would carry less weight as precedent than a written affirmance after deliberation. See *Jordan v. Gilligan*, ... F.2d ... (No. 73-1973) (7th Cir. July 19, 1973).

The courts in several circuits have been confronted with the problem: see, for example, *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972); *Hall v. Thornton*, 445 F.2d 834 (4th Cir. 1971); *Heaney v. Allen*, 425 F.2d 869 (2nd Cir. 1970); *Cross v. Bruning*, 413 F.2d 678 (9th Cir. 1969); *Port Authority Bondholders Protection Committee v. Port of New York Authority*, 387 F.2d 259 (2nd Cir. 1967). Uniformly those courts have held that they will not themselves hear a question the Supreme Court has previously branded as "insubstantial." Two of these courts relied in part on Justice Brennan's opinion in *Eaton, supra*, giving it what this court has discussed above as erroneous precedential value. See 457 F.2d at 364; 445 F.2d at 835. A widely cited student law review article, however, has criticized the *Port Authority* decision, pointing out that

the phrase "want of a substantial federal question" can have several meanings, not all of which should foreclose another federal court from exercising jurisdiction: "Where the Court was presented for the first time with a non-frivolous federal claim, and dismissed it summarily, it would be excessively harsh to hold that no lower federal court could thenceforth rule in favor of the argument advanced." Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts,* 68 Colum. L. Rev. 785, 791 (1968).

The highly speculative nature of lower court pronouncements about the import of Supreme Court summary procedures is made evident even in Judge Friendly's opinion in *Port Authority,* 387 F.2d at 262 n. 3; therefore it seems to this court safe to say that there is at least equal merit in a position opposite to that taken in the cases discussed above.

It is apparent that only the Supreme Court itself can resolve the dilemma. When this court considered the problem of the constitutionality of the California obscenity statute and the construction rendered by the state court in *Enskat,* there was certainly a substantial federal question presented. Since the summary treatment of Miller II upon remand is inextricably tied to *Enskat,* a case in which there was merely a denial of certiorari, this court cannot attach plenary precedential value to the summary treatment. There have been no doctrinal changes in the time between the original decision here and this petition for rehearing which should alter the previous determination.

III

All parties concede that the money seized from the theater has now been returned, and therefore it is proper that that requirement be eliminated from the judgment of June 4, 1974.

With reference to the return of the four films, the evidence presented to this court shows the following:

1. On January 29, 1974 at pre-trial hearings in the state municipal court, the Assistant District Attorney of Orange County stipulated that all four of the prints seized were identical. That stipulation was accepted by defense counsel. The court stated "the stipulation will be received."

2. The Assistant District Attorney stated that "Well, I think we're trying to resolve the problem in a practical fashion, Your Honor—It's not our desire to have to show more than one of those films at the time of trial if we can avoid it."

3. Plaintiffs' counsel have stated that they wish to honor that stipulation and therefore do not oppose the state officials' retaining one copy of the film.

Technically the defendants may be correct in saying that they have no power to return the film since it is in the custody of the Municipal Court. However, there was apparently little or no difficulty encountered by anyone involved in returning to the plaintiffs their money. At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal

Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.

It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.

Paragraph *two* of the judgment of this court will be amended to read as follows:

> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Except as the judgment will be so modified, the motions of the defendants are denied.

Dated this 3rd day of September, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge
/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Appellant, vs. Edward Lee Bailey, James Samuel Lytell, Walnut Properties, Inc., Vincent Miranda, John Doe I and John Doe II, Defendants and Respondents, No. AP-1594.

On Appeal from Municipal Court of the North Orange County Judicial District.

Filed: July 26, 1974.

Hon. Max Eliason, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the order to suppress pursuant to Penal Code Section 1538.5 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby reversed, *Aday v. Superior Court* (1961), 55 Cal. 2d 789. The *requisite prompt adversary determination of obscenity under Heller v. New York* (1973), 93 S.Ct. 2789, has been held. *Furthermore, for purposes of the 1538.5 and 1539-40 Penal Code* motion, defendants have not urged non-obscenity of the film.

The cause is remanded to the Municipal Court for further proceedings.

Dated this 26th day of July, 1974.

/s/ Kneeland
KNEELAND, Judge
/s/ Judge
JUDGE, Judge
/s/ Lee
LEE, Presiding Judge

Supreme Court, U. S.
FILED
OCT 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

October Term, 1974
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CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

The Appellees move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity with statute or rules of the Court or, in the alternative, to affirm the judgment of the District Court on the ground that the judgment, as amended on September 30, 1974, was clearly correct and that it is manifest upon the record herein that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinions Below.

Appellants have appealed from a judgment of the United States District Court for the Central District of California entered on July 4, 1974. The unreported Memorandum Opinion of the District Court and the Judgment appear as Appendix "A" to Appellants' Jurisdictional Statement. The unreported Supplemental Memorandum Opinion filed by the District Court on September 30, 1974, appears as Appendix "A" hereto. The Amendment to Judgment entered by the District Court on September 30, 1974, amending the judgment entered June 4, 1974, from which this appeal was taken, appears as Appendix "B" hereto.

Jurisdiction.

It is respectfully submitted that the appeal herein is not within the jurisdiction of this Court and is not taken in conformity to statute or to the rules of this Court. As discussed hereafter, reliance upon 28 U.S.C. §1253 as purportedly conferring jurisdiction on this Court of the appeal herein is unwarranted.

Questions Presented.

1. Whether the appeal should be dismissed as premature because Appellants filed Notice of Appeal to this Court while their timely motions to amend the judgment entered June 4, 1974, were pending, and where subsequently the judgment was amended as to a matter of substance on September 30, 1974.

2. Whether an appeal from a judgment of a three-judge District Court granting a declaratory judgment invalidating a state statute where no injunctive relief was granted against the enforcement of the statute is

within the jurisdiction of this Court, or whether such appeal lies only with the Court of Appeals.

3. Whether the judgment of the District Court, as amended on September 30, 1974, was correct, where the District Court found that Appellants, law enforcement authorities, acting in bad faith and for the purpose of harassment, seized four copies of a motion picture film from Appellees' theatre over a period of only two days in violation of this Court's ruling in *Heller v. New York,* 413 U.S. 483, where the prosecution and defense in the resulting state criminal prosecution stipulated that all four copies were identical and that only one copy was needed for trial, and where the District Court accordingly ordered Appellants to return to Appellees three of the four copies of the films seized.

4. Whether the judgment of the District Court, as amended on September 30, 1974, was correct in declaring the California obscenity statutes to be in violation of the constitutional requirements enunciated by this Court in *Miller v. California,* 413 U.S. 15, where the District Court found that the state obscenity statutes, on their face, are not limited to specifically defined sexual conduct, and where the District Court found that no limiting authoritative construction of the statutes ever had been rendered by the state appellate courts.

Statutes Involved.

The provisions of 28 U.S.C. §§2281 and 1253, the sections upon which Appellants rely to support their jurisdictional claim are as follows:

> §2281. An interlocutory or permanent injunction restraining the enforcement operation or execution of any State statute by restraining the action

of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§1253. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The pertinent provisions of the state obscenity statutes, California Penal Code §§311 and 311.2, appear in Appendix "E" to Appellants' Jurisdictional Statement.

Statement of the Case.

On November 29, 1973, Appellees filed their Complaint in the United States District Court for the Central District of California, invoking the jurisdiction of that Court under 28 U.S.C. §§1331 and 1343. The Complaint alleged that Appellants, law enforcement authorities of the City of Buena Park and the County of Orange, State of California, had acted to deprive Appellees, the owner of a theatre in Buena Park, his property holding company, and the theatre corporation, of certain constitutional rights (42 U.S.C. §1983). The Complaint alleged that Appellants, acting under color of the state obscenity statutes, seized four copies of a

film from Appellees' theatre within the space of two days, prior to any judicial determination in an adversary proceeding that the film was obscene. It was alleged that the multiple seizures of the film, together with seizures of all cash receipts present at the theatre, were undertaken for the purpose of harassing Appellees and suppressing exhibition of the film to the public. The Complaint prayed for a declaratory judgment that the state obscenity statutes violated the First and Fourteenth Amendments to the United States Constitution, and for the return of the seized property. A detailed statement of the facts as found by the District Court appears in the Court's Memorandum Opinion (Appendix "A" to Appellants' Jurisdictional Statement, pp. 1-5).

Thereafter, a three-judge court was convened which Court, on June 4, 1974, entered the judgment from which Appellants have taken this appeal. The District Court entered a judgment declaring the California obscenity statutes to be in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California,* 413 U.S. 15, and ordered Appellants to return to Appellees the property seized from Appellees' theatre.

On June 14, 1974, Appellants filed timely motions to amend and alter the judgment and for other relief pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (e), and Rules 60(a) and (b). While the motions were still pending before the three-judge court, Appellants filed Notices of Appeal to this Court on July 5, 1974.* Appellants Hicks and Younger filed Applications for Stays of the June 4 Judgment, which

*Appellants also filed Notices of Appeal to the Court of Appeals for the Ninth Circuit.

were denied by Mr. Justice Douglas on August 8 and 10, 1974.

On September 30, 1974, the District Court filed a Supplemental Memorandum Opinion (Appendix "A" hereto) setting forth its findings and conclusions with respect to Appellants' post-trial motions. Also on September 30, 1974, the District Court entered an amendment to the Judgment entered June 4, 1974 (Appendix "B" hereto). The Amendment deleted Paragraph 2 of the June 4 Judgment, requiring the return to Appellees of all four seized films and cash and added a new Paragraph 2 to read as follows: That "The defendants [Appellants] shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs [Appellees] three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park."

ARGUMENT.

1. The appeal herein from the judgment of the District Court entered June 4, 1974, is premature and, it is submitted, should be dismissed. Prior to filing their Notices of Appeal, Appellants filed timely motions to, *inter alia,* amend or alter the judgment entered June 4, 1974. The motions raised matters of substance, not form. Thereafter, on September 30, 1974, an amendment to the judgment was entered substantively changing the original judgment. Where a timely motion under Rule 59 of the Federal Rules of Civil Procedure has been made and not disposed of, the judgment is not final. Accordingly, the subsequent filing of a notice of appeal is a nullity and does not deprive the trial court of power to rule on the motion. Where the motion is not addressed to mere matters of form but rather raises questions of substance, *e.g.,* if it seeks reconsideration of basic findings of fact and conclusions of law, the purported appeal is premature and should be dismissed. See, *United States v. Crescent Amusement Company,* 323 U.S. 173, 177-178; *Turner v. HMH Publishing Company,* 328 F.2d 136 (5 Cir. 1964); *Healy v. Pennsylvania Railroad Company,* 181 F.2d 934 (3 Cir. 1950); *Tucker v. Reading Company,* 53 F.R.D. 453 (D.C. Pa. 1971); 11, Wright and Miller, Federal Practice and Procedure §2821; 9, Moore, Federal Practice, §203.11, n.14.

2. An appeal from the judgment of the District Court, as amended on September 30, 1974, is not within the jurisdiction of this Court, but lies only with the Court of Appeals to which Appellants also have filed Notices of Appeal. In their Jurisdictional Statement, addressed only to the District Court's judgment entered

June 4, 1974, Appellants argued in essence that this Court has jurisdiction over the appeal by virtue of that portion of the June 4 judgment ordering the return to Appellees of all four copies of the film seized from Appellees' theatre. Relying upon *Perez v. Ledesma,* 401 U.S. 82, Appellants appear to contend that the order to return all copies of the seized film operated to terminate a pending state criminal prosecution and, accordingly, constituted "an order granting . . . [a] permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges," within the meaning of 28 U.S.C. §1253. However, the amendment to the June 4 judgment, entered September 30, 1974, deleted that portion of the original judgment relied upon by Appellants as conferring jurisdiction upon this Court to hear the appeal, and instead amended the judgment to provide that "The defendants [Appellants] shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs [Appellees] three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park." [See, Appendix "B" hereto].

In its Supplemental Memorandum Opinion [Appendix "A" hereto], the District Court noted that the prosecution and defense in the state criminal prosecution arising out of the seizures had stipulated that all four copies of the film seized from Appellees' theatre were identical and that only one copy was needed for trial. As a result, the amendment to the judgment permitting Appellants to retain one copy of the film forecloses any contention that the District Court's judgment as amended will terminate or disrupt any state criminal

prosecution. Aside from the order to return three of the four copies of the film seized, the judgment of the District Court grants only declaratory relief with respect to the state statute involved. 28 U.S.C. §1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone, but such appeal lies only with the Court of Appeals. *Gerstein v. Coe,* 94 S.Ct. 2246; *Gunn v. University Committee,* 399 U.S. 383; *Mitchell v. Donovan,* 398 U.S. 427; *Rockefeller v. Catholic Medical Center of Brooklyn and Queens, Inc.,* 397 U.S. 820; see also, *Roe v. Wade,* 410 U.S. 113, 123.

In the light of the foregoing, the Appellees submit that the motion to dismiss the appeal upon the ground that the appeal is not within the jurisdiction of the Court should be granted.

3. In the alternative, the judgment of the District Court, as amended, was clearly correct in all respects. The essentially undisputed facts established that in the two days after Appellees commenced exhibiting the film in question at their theatre, Appellants seized in succession four copies of the film and all cash receipts at the theatre. The four seizures were made pursuant to search warrants issued *ex parte,* prior to any judicial determination in an adversary proceeding that the film was obscene.[1] Immediately following the last of the four seizures, the theatre ceased exhibition of the film in question. Appellants never have contended that four copies of the film were necessary as evidence in the single state misdemeanor prosecution arising out of ex-

---

[1]The adversary hearing regarding the alleged obscenity of the film to which Appellants refer in their Jurisdictional Statement, occurred only after the multiple seizures of the film. See, *Quantity of Copies of Books v. Kansas,* 378 U.S. 205; *Marcus v. Search Warrants of Property,* 367 U.S. 717.

hibition of the film. Nor have Appellants ever sought to justify seizure of all cash receipts from the theatre. The massive seizures, prior to a judicial determination of obscenity in an adversary proceeding, were undertaken in clear violation of this Court's ruling in *Heller v. New York,* 413 U.S. 483. The District Court was manifestly correct in concluding that "the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exercise the movie 'Deep Throat' out of Buena Park." [Appendix "A" to Appellants' Jurisdictional Statement, p. 18]. Such conduct, the District Court found, constituted law enforcement undertaken in bad faith for the purpose of harassing Appellees in the exercise of their freedom of speech and press.

The judgment of the District Court, as amended September 30, 1974, appropriately ordered Appellants to petition the state court to return to Appellees three of the four seized copies of the film, the cash receipts previously having been returned by means of a similar petition. Since it was stipulated that all four copies of the film were identical, and that only one copy was necessary as evidence in the state criminal prosecution, the District Court's amended judgment granted appropriate relief in the light of *Heller v. New York, supra,* while refraining from terminating or disrupting the state criminal prosecution. See, *Cinema Classics, Ltd. v. Busch,* 339 F.Supp. 43 (C.D. Cal. 1972), affrmd. 409 U.S. 807.

4. Appellees submit further that the District Court was correct in entering a declaratory judgment that the California obscenity statutes, Penal Code §§311

and 311.2, are unconstitutional in the light of this Court's decision in *Miller v. California,* 413 U.S. 15.[2]

The California obscenity statutes, it is conceded, do not specifically define any physical sexual conduct allegedly subject to regulation. On their face, the state statutes proscribe only expression. In this Court's decision in *Miller v. California,* 413 U.S. 15, the Court made clear that state statutes designed to regulate obscene materials must be carefully limited. The permissible scope of such regulation must be limited to works which depict or describe sexual conduct. "That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (413 U.S. at 23-24). The Court emphasized that under "the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice" (413 U.S. at 27). "Prerequisite" is defined as something that is "required beforehand; necessary as a preliminary condition." Webster's Third New International Dictionary, Unabridged (G.&C. Merriam Co., 1967).

Since the California obscenity statutes are not on their face limited to specifically defined sexual conduct, the issue presented is whether the statutes as construed

---

[2]Threshold questions relating to the equitable principles expressed in *Younger v. Harris,* 401 U.S. 37 and *Samuels v. Mackell,* 401 U.S. 66, and the doctrine of abstention are discussed in detail in the District Court's Memorandum Opinion [Appendix "A" to Appellants' Jurisdictional Statement] and in the District Court's Supplemental Memorandum Opinion [Appendix "A" hereto]. Appellees respectfully adopt the District Court's discussion of these issues.

satisfy the criteria of *Miller*. Following this Court's decision in *Miller*, a California Court of Appeal impliedly conceded that the statute as written does not meet the *Miller* test, but nevertheless stated that the statute had been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973) (hearing denied by the California Supreme Court, October 24, 1973) (cert. denied 94 S.Ct. 3225). In its Memorandum Opinion, the court below analyzed the *Enskat* decision and reached the contrary conclusion that no California appellate court ever had authoritatively construed the state obscenity statutes to confine their ambit only to specifically defined kinds of sexual conduct [Appendix "A" to Jurisdictional Statement, pp. 12-15]. Moreover, the *Enskat* decision itself did not even purport to read into the state obscenity statutes as a limitation the examples of specific sexual conduct referred to by this Court in *Miller* (413 U.S. at 25), nor any similar definitions. In its Supplemental Memorandum Opinion, the District Court noted that in *Hamling v. United States*, 94 S.Ct. 2887, this Court upheld the constitutionality of a federal obscenity statute by construing that statute so as to limit its reach to the examples of specific sexual conduct given by *Miller*. As the court below noted, the California appellate court in *People v. Enskat, supra*, rendered no such authoritative construction of the California obscenity statute [Appendix "A", pp. 5-6].

Accordingly, because the California obscenity statutes on their face do not proscribe only sexual conduct defined with specificity, and because the California appellate courts never have placed a satisfactory judicial gloss upon the statutes, the District Court correctly concluded that the statutes do not provide fair notice of what conduct is within their ambit, and thus do not satisfy the First and Fourteenth Amendment standards laid down by this Court in *Miller*.

Conclusion.

Wherefore, Appellees respectfully move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rules of the Court, or, in the alternative, to affirm the judgment of the District Court, as amended on September 30, 1974, on the ground that the said judgment was clearly correct and that it is manifest under the record here presented that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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APPENDIX "A."

Supplemental Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. No. 73-2775-F.

Filed: Sept. 30, 1974.

Before Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The defendants have filed appropriate motions to amend the judgment in this case which was filed June 4, 1974.

They allege that: (1) this court was factually in error when it held that the plaintiffs were not defendants in a criminal prosecution; (2) the judgment is contrary to the holding of the Supreme Court in *Hamling v. United States*, ... U.S. ...., 42 U.S.L.W. 5035 (U.S. June 24, 1974); and (3) the injunctive part of the judgment should be modified because (a) the money seized has been returned to the plaintiffs and (b) the films are under the custody of the Municipal Court which is not a party to these proceedings.

I

The first issue is one of serious consequence, for it goes to the heart of the court's reasoning on the issue of abstention. The court bottomed its decision on the abstention issue on the fact that no criminal proceedings had been instituted in state court against the plaintiffs by the date on which they filed their complaint in this court.

The evidence submitted by the defendants here reveals the following:

1. On the date of the filing of the complaint in this case, November 29, 1973, there was pending in the state municipal court an 8-count misdemeanor complaint against Edward Lee Bailey and James Samuel Lytell in connection with the exhibition of "Deep Throat" in Buena Park.

2. Copies of that complaint were furnished this court on December 3, 1973.

3. Neither Mr. Bailey nor Mr. Lytell are parties to this action.

4. The complaint in this action was served upon the District Attorney of Orange County by a deputy United States marshal on January 14, 1974; the other defendants had been served a few days before.

5. On January 15, 1974, a day after that service, the criminal complaint in the state municipal court was amended by the District Attorney of Orange County to include Vincent Miranda and Walnut Properties, Inc., plaintiffs in this action.

6. The defendants rely on the amended state criminal complaint and urge abstention.

The operation of the abstention doctrine when criminal charges are pending is outlined in a trilogy of

cases decided in 1971: *Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); and *Perez v. Ledesma,* 401 U.S. 82 (1971). In each of those cases, a criminal indictment or information had been filed against the plaintiff *before* a complaint was filed in the federal district court. When no criminal charge is pending, however, the case is governed by the doctrine of *Steffel v. Thompson,* .... U.S. ...., 42 U.S.L.W. 4357 (U.S. March 19, 1974). There, the Court noted:

> When no state criminal proceeding is pending at the time the federal complaint is *filed,* federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. . . . 42 U.S.L.W. at 4360 (emphasis added)

It is clear that for purposes of the abstention doctrine, a determination of whether there is an "ongoing state criminal prosecution" against the plaintiff is measured as of the time of the filing of the complaint in federal court. The fact that the defendants filed criminal charges against the plaintiff after the instant case was under consideration does not alter this court's duty to decide the controversy before it.

Furthermore, the later criminal charges would seem to supply added justification for action by the court. The Chief Justice, in a recent and extensive separate opinion, commented about the burdens and possible ramifications of *Younger v. Harris.* See *Allee v. Medrano,* 42 U.S.L.W. 4736 (U.S. May 20, 1974) (Burger, C. J., concurring in part and dissenting in part.) He there noted that inferences of bad faith can arise from the common activity of the prosecutors and the

police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction. While the strict requirements of *Younger* are only of tangential relevance to the prior opinion of this court, the evidence brought to light by the petition for rehearing only serves to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the course of action revealed in the latest petition.

No explanation is given why criminal charges were not instituted against the plaintiffs here until after the filing and service of the complaint in this action. Without such an explanation it is reasonable for the court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court. That conclusion surely removes this case from the abstention doctrine of *Younger* and *Mackell*.

II

Defendants have requested that this court reconsider its holding in light of the recent decision of the Supreme Court in *Hamling v. United States*, ... U.S. ...., 42 U.S.L.W. 5035 (U.S. June 24, 1974). There, the Court upheld the constitutionality of a *federal* statute which prohibits the mailing of obscene matter, holding that the statutory language as construed met the specificity test of *Miller v. Caliornia*, 413 U.S. 15 (1973). More exactly, Justice Rehnquist referred to footnote 7 of *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 (1973) as authority for the construction the Court offered in *Hamling;* i.e., that the terms

"obscene", etc., include the specific "hard-core" matter as described in *Miller* at 25:

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

See 42 U.S.L.W. at 5043. That such a construction would be possible was noted by this court in its original opinion; there is nothing in *Hamling v. United States* to suggest that the Supreme Court there did anything more than exercise its authority to construe federal statutes, an authority alluded to in that same footnote 7 of *12 200-ft. Reels.* See *United States v. Thirty-seven Photographs,* 402 U.S. 363 (1971); compare the dissenting opinion of Black, J., *id.* at 384.

More importantly, there is nothing in *Hamling* which would lead this court to believe that the specificity requirements of *Miller* have been overruled. The tenets of *Miller* have not been met, either by the California statute on its face or as construed, either pre-*Miller* or in *Enskat*. There has been no construction by the California courts of an obscenity standard based upon specific acts, nor any formulation comparable to that added to the federal statute in *Hamling*. The Supreme Court in *Hamling*, in fact, points out in detail the infirmity of *Enskat*. In *Hamling* the Court set forth with regard to the federal statute a specific jury instruction which meets the specificity test of *Miller*. However, no such specific instruction is found in *Enskat*, nor can one be inferred. Nothing in that opinion contains language from which an instruction to a jury could be

drawn as to what specific conduct may be constitutionally proscribed.

This court is also faced with the recent dismissal by the Supreme Court of *Miller v. California,* ..... U.S. ....., 42 U.S.L.W. 3711 (U.S. July 25, 1974) (Miller II), "for want of a substantial federal question." When *Miller v. California,* 413 U.S. 15 (1973) (Miller I) was decided in the 1973 term of the Court, the case itself was remanded to the state courts in light of the new obscenity standards developed therein. Upon remand, the case was reaffirmed by the Appellate Department of the California Superior Court of Orange County with the following notation: "affirmed, *People v. Enskat* (1973) 33 Cal.App. 3d 900". *People v. Enskat* was docketed with the Supreme Court *sub nom. Enskat v. California;* the writ of certiorari in that discretionary appeal was denied. 42 U.S.L.W. 3712 (U.S. July 25, 1974).

Enskat is the case discussed and analyzed in the original opinion in this case. The denial of the writ of certiorari in that case does not operate as a decision on the merits. See *Polites v. United States,* 364 U.S. 426, 433 n. 9 (1960); *United States v. Shubert,* 348 U.S. 222, 228 n. 10 (1955). The appeal in *Miller,* however, was taken under 28 U.S.C. § 1257(e) as an appeal of right. This court must now ascertain whether the summary action in Miller II operates as a decision on the merits of the challenge to the constitutionality of the California obscenity statute.

The question is one which has led to commentary by many of this country's preeminent Federal Jurisdiction and Constitutional Law scholars. Professor Bickel would characterize a dismissal for lack of a substantial federal question as a refusal by the Court to exercise its jurisdiction; a reflection of pragmatic considerations and institutional expediency, but not necessarily a decision on the merits. A. Bickel, *The Least Dangerous Branch* (1962). Professor Wechsler, however, feels that the Court should not have the option to decide or reject those cases before it on appeal as of right. H. Wechsler, *Towards Neutral Principles of Constitutional Law* (1961). Professor Gunther sides with the antidiscretion forces, terming those instances in which the Court has clearly ducked a substantial federal question as "aberrations." Gunther, *The Subtle Vice of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 Colum. L. Rev. 1, 12 (1964).

Defendants have mistakenly asserted that Justice Brennan's separate opinion in *Ohio ex rel. Eaton v. Price,* 360 U.S. 246 (1959) forecloses the question and definitely establishes that such a dismissal is on the merits. Justice Brennan was not there speaking for the Court, which itself had done no more than note probable jurisdiction of the case on the basis of a 4-4 vote. Rather, he was expressing his personal displeasure at the decision of four of his colleagues to make known the reason for their votes against noting jurisdiction. His statement were, therefore, no more than one justice's passing comments on an issue not before the Court.

It should be noted tangentially that quite a different issue arises when, after deliberation, the Court affirms a decision below by a 4-4 vote, as happened after oral argument in the *Eaton* case. 364 U.S. 263 (1960). Because of lack of agreement by a majority of the Court, many people, including Justice Brennan, feel that such affirmances, while binding on the parties, have no

value as precedent. See 364 U.S. at 264; *United States v. Pink,* 315 U.S. 203, 216 (1942); *Hertz v. Woodman,* 218 U.S. 205, 212-14 (1910).

Thus this court can do no more than take note of Justice Brennan's statement on the dismissal question, and perhaps contrast it with the apparent thrust of Justice Harlan's dissent in *Redrup v. New York,* 386 U.S. 767, 771 (1967) at 772, in which he seemed to embrace the Bickel view and equate dismissal of a writ of certiorari as improvidently granted with a dismissal of an appeal for want of a substantial federal question. More recently, Justice Rehnquist, writing for the Court in *Edelman v. Jordan,* 94 S. Ct. 1347, 1359-60 (1974), suggested that a summary affirmance would carry less weight as precedent than a written affirmance after deliberation. See *Jordan v. Gilligan,* .... F.2d .... (No. 73-1973) (7th Cir. July 19, 1973).

The Courts in several circuits have been confronted with the problem: see, for example, *Ahern v. Murphy,* 457 F.2d 363 (7th Cir. 1972); *Hall v. Thornton,* 445 F.2d 834 (4th Cir. 1971); *Heaney v. Allen,* 425 F.2d 869 (2nd Cir. 1970); *Cross v. Bruning,* 413 F.2d 678 (9th Cir. 1969); *Port Authority Bondholders Protection Committee v. Port of New York Authority,* 387 F.2d 259 (2nd Cir. 1967). Uniformly those courts have held that they will not themselves hear a question the Supreme Court has previously branded as "insubstantial." Two of these courts relied in part on Justice Brennan's opinion in *Eaton,* supra, giving it what this court has discussed above as erroneous precedential value. See 457 F.2d at 364; 445 F.2d at 835. A widely cited student law review article, however, has criticized the *Port Authority* decision, pointing out that the prase "want of a substantial federal question" can have several meanings, not all of which should foreclose another federal court from exercising jurisdiction: "Where the Court was presented for the first time with a nonfrivolous federal claim, and dismissed it summarily, it would be excessively harsh to hold that no lower federal court could thenceforth rule in favor of the argument advanced." Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts,* 68 Colum. L. Rev. 785, 791 (1968).

The highly speculative nature of lower court pronouncements about the import of Supreme Court summary procedures is made evident even in Judge Friendly's opinion in *Port Authority,* 387 F.2d at 262 n. 3; therefore it seems to this court safe to say that there is at least equal merit in a position opposite to that taken in the cases discussed above.

It is apparent that only the Supreme Court itself can resolve the dilemma. When this court considered the problem of the constitutionality of the California obscenity statute and the construction rendered by the state court in *Enskat,* there was certainly a substantial federal question presented. Since the summary treatment of Miller II upon remand is inextricably tied to *Enskat,* a case in which there was merely a denial of certiorari, this court cannot attach plenary precedential value to the summary treatment. There have been no doctrinal changes in the time between the original decision here and this petition for rehearing which should alter the previous determination.

III

All parties concede that the money seized from the theater has now been returned, and therefore it is proper that that requirement be eliminated from the judgment of June 4, 1974.

With reference to the return of the four films, the evidence presented to this court shows the following:

1. On January 29, 1974 at pre-trial hearings in the state municipal court, the Assistant District Attorney of Orange County stipulated that all four of the prints seized were identical. That stipulation was accepted by defense counsel. The court stated "the stipulation will be received."

2. The Assistant District Attorney stated that "Well, I think we're trying to resolve the problem in a practical fashion, Your Honor—It's not our desire to have to show more than one of those films at the time of trial if we can avoid it."

3. Plaintiffs' counsel have stated that they wish to honor that stipulation and therefore do not oppose the state officials' retaining one copy of the film.

Technically the defendants may be correct in saying that they have no power to return the film since it is in the custody of the Municipal Court. However, there was apparently little or no difficulty encountered by anyone involved in returning to the plaintiffs their money. At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.

It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.

Paragraph *two* of the judgment of this court will be amended to read as follows:

> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Except as the judgment will be so modified, the motions of the defendants are denied.

Dated this 30 day of September, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge

/s/ William G. East
WILLIAM G. EAST
United States District Judge

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX "B."

Amendment to Judgment.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: September 30, 1974.

Before Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The court having heretofore issued its Supplemental Memorandum Opinion, said opinion constituting its findings of fact and conclusions of law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure,

IT IS DECREED as follows:

1. Paragraph *two* of the judgment of this court filed June 4, 1974 in this proceeding is amended to read as follws:

> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of

the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Dated this 30th day of September, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge

/s/ William G. East
WILLIAM G. EAST
United States District Judge

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Supreme Court, U. S.
FILED
OCT 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief in Opposition to Motion to Dismiss or Affirm.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief in Opposition to Motion to Dismiss or Affirm.

Appellants in the above-entitled action, pursuant to Rule 16.4 of the Supreme Court Rules respectfully submit the following argument in opposition to Respondent's motion to dismiss or affirm and specifically in opposition to the question posed by Respondents as to whether the appeal should be dismissed as premature because Appellants filed Notice of Appeal to this Court "while *timely motions to amend the judgment* were pending before the three-judge Court."

Appellants respectfully submit that the above question is based on a false premise since there were *no*

timely motions under Rule 52 either *made* or *pending* at the time the purported amendment of judgment was filed.

The record on appeal duly certified to this Honorable Court on August 22, 1974, shows that Appellants made the following post-trial motions:

On June 14, 1974, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed a document entitled *Notice of Motion for Rehearing and for Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in Judgment and to Stay Judgment Pending Determination of that Motion.* This document (C.T. pp. 531-532) consists of two pages and notifies the parties that *a motion will be made on July 1, 1974.* Appellants Cecil Hicks and Oretta D. Sears, also on June 14, 1974, filed notice *that on July 1, 1974,* Appellants, *pursuant to Rule 60(b)(1),* would move *for Relief from Judgment, for Rehearing and for Stay of Judgment Pending Determination of this Motion.*

The Points and Authorities filed in support of Appellants' notices of motions clearly show that Appellants only sought to have the Court reconsider its legal position and vacate the judgment on jurisdictional grounds. The original three-judge Court made a finding of fact that there were related state prosecutions pending in the state Courts and concluded that as a matter of law the existence of related prosecutions of the theater employees did not affect the Federal Plaintiffs' rights to declaratory relief. The Points and Authorities reiterate the

existence of state prosecutions and ask the three-judge Court to reconsider its position as to its jurisdiction.

The Points and Authorities further pointed out that officers acting under authority of valid search warrants cannot be said to be in "bad faith." This argument was again one challenging a legal conclusion of the Court. Finally, the impropriety of the order to return was reiterated. The requested relief was *specifically* designated to be under Rule 60(b)(1) of the Federal Rules of Criminal Procedure (C.T. 533-A).

On June 24, 1974, the three-judge Court entered an order which reads:

> The motions of the defendants filed June 14, 1974 and scheduled for hearing on July 1, 1974 will be submitted and determined without oral hearing upon brief written statements of reasons in support and opposition pursuant to Rule 78 of the Federal Rules of Civil Procedure.
>
> IT IS FURTHER ORDERED that the Clerk serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.
>
> Dated this 24th day of June, 1974.
>
> Warren J. Ferguson
> WARREN J. FERGUSON
> United States District Judge

On July 5, 1974, a Monday and the last day in which to file a notice of appeal, Appellants who never intended their notice of motion to disturb the finality of the June 4, 1974 judgment, duly filed a notice of appeal to this Court and a protective notice of appeal to the Ninth Circuit.

The appeal was duly perfected and docketed with this Honorable Court on August 22, 1974.

Prior to that time, the Respondents had considered the decision as final and had in fact, sought and obtained orders to show cause to enforce all aspects of the judgment (See Jurisdictional Statement Appendix C).

On August 9, 1974, Appellants were enjoined by Judge Ferguson from conducting further seizures not only of the movie "Deep Throat" but also of the movie "Devil in Miss Jones." Such orders, again as pointed out in the jurisdictional statement, were made by one member of the three-judge Court and because made in this particular action can only be construed as having been made to enforce the judgment entered on June 4, 1974.

On September 30, 1974, in spite of the fact that the Points and Authorities show the intent to file a motion under Rule 60, because the *notice* of motion filed by some of Appellants *also* referred generally to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure, and because the *notice of motion* was coincidentally filed the *tenth* day after entry of judgment, the three-judge Court apparently elected to treat the "motions" as having been timely made under Rule 52 of the Federal Rules of Civil Procedure and entered its alleged supplemental opinion purporting to amend the

judgment in such a way as to require Appellants to either nullify the Appellate jurisdiction of this Honorable Court or to once more be subjected to Federal contempt proceedings.

The supplemental opinion, in fact, makes no material changes to its prior order. It merely reiterates its prior findings that the California obscenity laws are unconstitutional and purports to amend the second part of the judgment by substituting the following order to the priorly made order to return the films:

> At the January 29th proceeding in the Municipal Court, the assistant District Attorney, stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.
>
> It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.
>
> Paragraph *two* of the judgment of this court will be amended to read as follows:
>
> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

> Except as the judgment will be so modified, the motions of the defendants are denied. (Attachment D.)

Appellants submit that the supplemental opinion and the modification of judgment are void because the three-judge Court had lost jurisdiction over the action since the notice of appeal had been timely filed on July 5, 1974 (a Monday). The record on appeal had been duly requested and the appeal docketed with this Honorable Court on August 22, 1974—nearly ten days prior to the entry of the supplemental opinion and of the amended judgment. See *e.g. Sumida v. Yumen,* (C.A. Hawaii 1969) 409 F.2d 654 cert. den. 405 U.S. 964; *O'Brien v. Avco* (D.C. N.Y. 1969) 309 F.Supp. 703; *Hogg v. United States* (C.A. Ky. 1969) 411 F.2d 578.

In the analogous case of *United States v. Frank B. Killian,* 269 F.2d 494, the United States Court of Appeals for the Sixth Circuit, pointed out that the notice of appeal operated to divest the district court of jurisdiction to rule on the government motion to reconsider, brought under Rule 60(b). The Court stated:

> Next to be considered is appellee's opinion here to dismiss the appeal as prematurely brought. Appellee's argument, briefly put, is that the Government's motion to reconsider and for relief from judgment suspended the finality of the order of dismissal, and so made the notice of appeal premature. There is no merit in this point. See: Fed. R.Civ.P. rule 60(b)(6); *Raughley v. Pennsylvania R. Co.*, 3 Cir., 1956, 230 F.2d 387.
>
> The Government's notice of appeal, filed August 4, 1958, operated to transfer jurisdiction to this

> court (Fed. R.Civ.P. rule 73), and thereafter the District Court had no jurisdiction of the cause, other than to act in aid of the appeal as empowered by the Federal Rules of Civil Procedure. In re Federal Facilities Realty Trust, 7 Cir., 1955, 227 F.2d 651, 654. Having no jurisdiction to entertain the Government's motions for reconsideration and for leave to amend while an appeal was pending, the District Court's order overruling those motions was a nullity.

In *Keohane v. Swarco Inc.*, 320 F.2d 429 the Court concluded that a notice of appeal transfers jurisdiction even where a timely motion had been made under Rule 52. The Court there states:

> In our judgment, the motion to amend was timely made. It tolled the running of the time for appeal in No. 15,284. Rule 73; *Leishman v. Associate Wholesale Electric Co.*, 318 U.S. 203, 63 S.Ct. 543, 87 L.Ed. 714; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160. Since the District Court had not passed upon the motion to amend at the time the notice of appeal was filed, the judgment of dismissal was not final. The appeal was, therefore, premature. *Reconstruction Finance Corp. v. Mouat,* 184 F.2d 44 (C.A. 9); *Segundo v. United States,* 221 F.2d 296 (C.A. 9).
>
> The taking of the appeal even though from an interlocutory nonappealable order nevertheless transferred jurisdiction to the Court of Appeals. The orders entered by the District Court on January 16th, March 6th and March 14, 1963 were null and void since that court was without juris-

diction to make them after the appeal had been taken. *Merritt-Chapman & Scott Corp. v. City of Seattle,* 281 F.2d 896 (C.A. 9); *United States v. Frank B. Killian Co.,* 269 F.2d 491 (C.A. 6); *Hirsch v. United States,* 186 F.2d 524 (C.A. 6).

The three-judge Court should not be allowed to defeat the jurisdiction of this Court to hear a matter of so great an impact to the State of California by being allowed to consider a notice of motion ~~of judgment~~ as sufficient to satisfy the requirements of Rule 52 of the Federal Rules of Civil Procedure because served and filed ten days after entry. Although the Federal Court has great discretion in waiving defects in pleadings, it should not be allowed to construe a motion to be other than what it is. Notifying the clerk of the party's intention to file a motion for new trial *does not* constitute the filing of a motion for new trial and does not extend the time for appeal [See *e.g. Wagoner v. Fairview Consol. School Distr. No. 5* (C.A., Colo. 1961) 289 F.2d 480, cert. den. 368 U.S. 921]. A motion which asks for rehearing and for vacation of judgment cannot be treated as a motion to amend under Rule 52. Indeed, as has so often been stated, a motion under Rule 52 cannot be made to serve as a vehicle for rehearing (*Minneapolis Honeywell v. Midwestern Instrument* (D.C. Ill. 1960) 188 F.Supp. 248, affirmed 298 F.2d 36; *Heikkila v. Barber* (D.C. Cal. 1958) 164 F.Supp. 587; *Blair v. Delta Air Lines* (D.C. Fla. 1972) 344 F.Supp. 367).

Appellants' intended purpose, as to the type of motion they intended to file, is evidenced by the fact that the notices in conformance with Rule 3 of the Local Rules of the United States District Court, Central District of California, notify opposing party that the motion *shall* be made on July 1, 1974, a requirement which Rule 3 specifies is inapplicable to motions under Rule 52.

Similarly, neither notice of motion could in any way be considered as a motion under Rule 59 of the Federal Rules of Civil Procedure since the procedural requirements for such a motion which are set forth in Rule 17 of the Local Rules were deliberately bypassed.

Appellants further submit that even if the September 30, 1974 judgment were to be considered to have been properly entered, the prematurity of the notice of appeal should be disregarded as an irregularity not affecting substantial rights and should not be allowed to justfy a dismissal of the appeal (See *Lemke v. United States,* 346 U.S. 325, 98 L.Ed. 3; *see also Curtiss Gallery and Library Inc. v. United States* (C.A. Cal. 1967) 388 F.2d 358; *Ruby v. Secretary of United States Navy* (C.A. 9th 1966) 365 F.2d 385).

The supplemental opinion and the amended judgment, in fact, do not alter the jurisdiction of this Hororable Court. The judgment as amended is injunctive in nature. It is directed to state officials and its impact on enforcement of the state laws is far greater than was the original order to return.

As shown by the jurisdictional statement and by the record on appeal, the Appellate Department of the Orange County Superior Court on July 26, 1974, in an appeal taken in the state criminal proceedings, made a finding that the movies were properly seized and that prompt adversary hearing as required by *Heller v. New York* had been had. The order of the Appellate Department resulted from an appeal instituted by Ap-

pellant District Attorney of Orange County in the state criminal action in which Respondents herein are defendants. The three-judge Court now orders the same district attorney to "in good faith" petition for the return of the items declared non-returnable by the State Court. It asks the District Attorney to, in effect, tell the Municipal Court to directly violate the order of the State Appellate Court and to do so "in good faith."

The existence of the order is in such direct conflict with the interests of the People of the State of California in this case as to probably require the Attorney General to take over on behalf of the People since the District Attorney can no longer perform the function of his office because of the conflict of interest created by the order. The impact of such required intervention on the proper enforcement of the California laws is self-evident. Additionally, the order requires the District Attorney to act *against* the interests of the People he has a sworn duty to represent. It requires him to act *against* the valid orders of the State Court which orders he has a statutory duty to uphold. The order thus effectively frustrates the enforcement, operation *and* execution of the state laws.

The importance of this case which, as shown by the jurisdictional statement, is controlling on at least 17 other cases, is obvious. The disruption brought by the ruling of the three-judge Court to the particular criminal action is evidenced by the fact that the state criminal proceeding, in which jury selection was finally scheduled to begin on October 21, 1974, has been stayed by the Court of Appeal of the State of California, Fourth Appellate District, Division Two. That court, acting on the petition of Respondent Vincent Miranda in the

case of *Vincent Miranda v. Municipal Court of North Orange County Judicial District*, 4 Civ. 13914, NOC case NM7306675, on October 18, 1974, entered the following order:

> Temporary stay of trial granted pending decision on Petition for Writ of Prohibition.

The Petition, filed with that Court and of which the Court can take judicial notice, alleges that Vincent Miranda cannot be tried because the three-judge Court has declared the California obscenity laws to be unconstitutional and, as to him, the decision has *res judicata effect*. A copy of the petition is attached as Attachment A. If this contention of Respondent is correct, unless this Honorable Court grants relief, enforcement of the California obscenity laws will of necessity be unequal since the laws will be binding on some persons and not on others while the appeal in this case is pending.

Interestingly, a determination of the *res judicata* issue will require the State Appellate Court to determine the validity of the Federal Court order, thus possibly resulting in yet another conflicting decision entered in a collateral proceeding. Additionally, all cases dealing with California obscenity laws docketed with this Court are on Petition for Certiorari. The supplemental opinion refuses to consider the second *Miller* opinion of this Court as binding precedent and has rejected this Court's denial of certiorari as an indication of this Court's thinking. Rather it has considered the denials of certiorari as an indication of its own right to declare the California obscenity laws unconstitutional.

Accordingly, the above problems and conflicts can only be effectively resolved by this Honorable Court since, if the three-judge Court acted jurisdictionally, this Court has jurisdiction to act on the merits. Con-

versely, if the three-judge Court did not have jurisdiction over the action, this Court can still resolve the merits of the controversy by resolving the jurisdictional issue because, as most aptly pointed out by Stern and Grossman, *Supreme Court Practice*, Sec. 2.14, page 53:

> The three-judge-court procedure is not properly invoked unless the constitutional question raised is "substantial." *Ex-parte Poresky*, 290 U.S. 30; *Flast v. Cohen*, 392 U.S. 83, 91, n. 4. See Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 La. L. Rev. 813 (1959). "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court, as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255; *Swift & Co. v. Wickham*, 382 U.S. 111, 115; *Zemel v. Rusk*, 381 U.S. 1, 6; *Bell v. Waterfront Commission*, 279 F.2d 853 (C.A. 2).

As thereafter pointed at Section 2.17 at page 70:

> If there is a complete lack of jurisdiction in the district court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the decree of a three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont & Northern R. Co. v. United States*, 280 U.S. 469. This power of the Court exists regardless of whether the three-judge court has entered a judgment for the plaintiff or the defendant. As long as a decree was entered on the merits, the Court has jurisdiction to reverse it and to order a dismissal for want of jurisdiction. See *Smallwood v. Gallardo*, 275 U.S. 56, 62; *Piedmont & Northern R. Co. v. United States, supra*, at 478.

In the case at hand, the jurisdictional statement and Judge Lydick's order (Appendix B, p. 22) show that the jurisdiction of the three-judge Court is based on that Court's finding that the constitutionality of the California Obscenity Statutes presents a "substantial federal question." This Honorable Court in *Miller v. California*, ... U.S. ...., 41 L.Ed.2d 1033 dismissed an appeal presenting this identical issue "for want of a substantial Federal question." The basis for the three-judge Court jurisdiction in this case is thus clearly non-existent.

Although the three-judge Court purported to also base its jurisdiction on the alleged findings of harassment, those findings are contrary to the ones made by Judge Lydick—the judge who certified the case as to the constitutionality of the California statute. Had the case not been certified, Judge Lydick's findings would unquestionably be unassailable on appeal. (See *e.g. Sims v. Dial*, 350 F.Supp. 747 where a three-judge federal court rejected the "novel proposition of law" that actions paralleling the ones in the case at hand established bad faith harassment as a matter of law.)

Absent the presence of a substantial federal question as to the constitutionality of the statute, the three-judge Court *and* Judge Lydick should have dismissed the complaint.

In light of the above factors, should the Court determine that it has no jurisdiction in this action, reversal

of the three-judge Court decree and remand with directions to dismiss the complaint for want of jurisdiction would seem the most appropriate means to restore order to the procedural nightmare created by the presently existing conflicting orders of the State and Federal Courts.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General, State of California,

JACK WINKLER,
Chief Assistant Attorney General,

ARLOW SMITH,
Assistant Attorney General,

ALVIN KNUDSON,
Deputy Attorney General,

RONALD H. BEVINS,
City Attorney, City of Buena Park,

CECIL HICKS,
District Attorney,
County of Orange, State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,
Head, Writs & Appeals Section,

Attorneys for Appellants.

APPENDIX.

Petition for Writ of Prohibition and Application for Temporary Stay and Memorandum of Points and Authorities in Support Thereof.

In the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Vincent Miranda, Petitioner, vs. Municipal Court of the North Orange County Judicial District, County of Orange, State of California, Respondent, People of the State of California, Real Party in Interest. No. 4 CIV 13914.

Fleishman, McDaniel, Brown & Weston, 6922 Hollywood Boulevard, Suite 718, Hollywood, California 90028, [213] 466-6171. By: JOHN H. WESTON, Attorneys for Petitioner.

Petition for Writ of Prohibition and Application for Temporary Stay.

In the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Vincent Miranda, Petitioner, vs. Municipal Court of the North Orange County Judicial District, County of Orange, State of California, Respondent, People of the State of California, Real Party in Interest. No. 4 CIV 13914.

TO: THE HONORABLE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Petitioner, VINCENT MIRANDA, respectfully applies for a Writ of Prohibition by this verified petition, and alleges and represents to this Court as follows:

I

Petitioner is a defendant in an action entitled *People of the State of California v. Edward Lee Bailey, James Samuel Lytell, Vincent Miranda and Walnut Properties, Inc.*, No. NM 73 06675, now pending before Respondent Court, which matter is presently set for trial on October 21, 1974.

II

Respondent is the Municipal Court of the North Orange County Judicial District, County of Orange, State of California.

III

The Real Party in Interest herein is The People of the State of California, plaintiff in the aforesaid action now pending in Respondent Court.

IV

On January 15, 1974, an amended complaint was filed in Respondent Court alleging that Petitioner, VINCENT MIRANDA, and the other parties named in paragraph I of this petition, violated the State obscenity statute, Penal Code § 311.2, by exhibition of the film "Deep Throat" during the month of November, 1973.

V

Prior to the filing of the aforesaid amended complaint in Respondent Court, Petitioner VINCENT MI-

RANDA was charged with violating Penal Code § 311.2 by exhibition of the film "Deep Throat" in an action entitled *People of the State of California v. Vincent Miranda,* Municipal Court of the Beverly Hills Judicial District, County of Los Angeles, State of California, No. M-34539. Jury trial was had in the aforesaid action, resulting in a declaration of mistrial on October 18, 1973, after the foreman of the jury advised the court that the jury stood nine for acquittal and three for conviction and were unable to reach a verdict.

VI

All evidence adduced by Petitioner in the aforesaid Beverly Hills trial was on the issue of the non-obscenity of the film "Deep Throat". All of the jurors who voted for acquittal based their decision solely on the issue of obscenity. Following the mistrial, on June 18, 1974, the charge against Petitioner was dismissed by the Municipal Court of the Beverly Hills Judicial District, pursuant to Penal Code § 1385, upon the motion of the prosecution. The said motion to dismiss was made and granted on the basis that the prosecution was unable to prove the alleged obscenity of the film "Deep Throat".

VII

As a result of the foregoing facts, the prosecution now pending against Petitioner in Respondent Court is barred by the double jeopardy, collateral estoppel, due process and free speech and press provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution, by the provisions of Article I, Sections 9 and 13 of the California Constitution, and by the provisions of Penal Code § 1387.

VIII

In the action pending against Petitioner in Respondent Court, the plaintiff therein, The People of the State of California, is represented by the District Attorney for the County of Orange, CECIL HICKS. Petitioner, VINCENT MIRANDA, brought an action in the United States District Court for the Central District of California entitled *Vincent Miranda, et al. v. Cecil Hicks, et al.*, Civil No. 73-2775-F, naming as defendants, *inter alia*, the said District Attorney of Orange County, Cecil Hicks. The action alleged that the California obscenity statutes are unconstitutional, violating the First and Fourteenth Amendments to the United States Constitution. In a final judgment, entered on June 4, 1974, and amended September 30, 1974, the said court issued a declaratory judgment that the California obscenity statutes are unconstitutional and do violate the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution. [Copies of the Memorandum Opinion and Judgment, and the Supplemental Memorandum Opinion and Amendment to Judgment in *Miranda, et al. v. Hicks, et al.* are attached hereto as EXHIBIT A.]

IX

In the aforesaid federal action brought by Petitioner, VINCENT MIRANDA, against CECIL HICKS and others, the Federal Court found that the prosecution now pending against Petitioner VINCENT MIRANDA in Respondent Court was brought in bad faith for the purpose of harassment. The Federal Court found the following facts in its Supplemental Memorandum Opinion filed September 30, 1974:

(a) On the date of the filing of the Federal Complaint by Petitioner VINCENT MIRANDA, November 29, 1973, there was pending in the Municipal Court of the North Orange County Judicial District an eight-count misdemeanor complaint against EDWARD LEE BAILEY and JAMES SAMUEL LYTELL in connection with the exhibition of "Deep Throat" in Buena Park.

(b) Neither Mr. Bailey nor Mr. Lytell are parties to the federal action.

(c) The Complaint in the federal action was served upon the District Attorney of Orange County, CECIL HICKS, by a Deputy United States Marshal on January 14, 1974; the other defendants in the federal action had been served a few days before.

(d) On January 15, 1974, a day after service of the Federal Complaint upon CECIL HICKS, the criminal complaint in the Municipal Court of the North Orange County Judicial District, Respondent herein, was amended by District Attorney HICKS to name Petitioner VINCENT MIRANDA as a defendant.

X

The Federal Court in *Miranda v. Hicks* found that the facts set forth in the preceding paragraph "only [serve] to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the [foregoing] course of action. . . ."

> "No explanation is given why criminal charges were not instituted against the plaintiffs here [VINCENT MIRANDA and WALNUT PROPERTIES, INC.] until after the filing and service of the complaint in this action. Without such an

explanation it is reasonable for the Court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this Court." [Supplemental Memorandum Opinion, p. 4.]

XI

As a result of the final judgment entered in the aforesaid action of Miranda v. Hicks, Respondent Court is without jurisdiction of the offenses charged against Petitioner VINCENT MIRANDA in the amended complaint now pending before Respondent Court, because the said prosecution was brought in bad faith for the purpose of harassing said Petitioner, and the said prosecution accordingly deprives Petitioner of due process of law, denies him the equal protection of the laws, and abridges the exercise of freedoms of speech and press, contrary to the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 11, 13 and 21 of the California Constitution.

XII

As a further result of the final judgment entered in the aforesaid action of *Miranda v. Hicks,* the prosecution now pending against Petitioner VINCENT MIRANDA in Respondent Court is barred by the doctrine of *res judicata,* the unconstitutionality of Penal Code § 311.2 having been determined on the merits in a final judgment rendered between Petitioner VINCENT MIRANDA and CECIL HICKS, District Attorney of Orange County.

XIII

On October 15, 1974, Petitioner moved Respondent Court, the Honorable JAMES COOK, Judge Presiding, to enter a plea of once in jeopardy and to dismiss the aforesaid amended complaint against Petitioner VINCENT MIRANDA. The motions were made upon the grounds set forth in the preceding paragraphs of this petition. On October 15, 1974, Respondent Court denied Petitioner's motions.

XIV

On October 15, 1974, Petitioner filed a petition for writ of prohibition in the Superior Court of the State of California for the County of Orange. The petition set forth all of the aforementioned allegations contained in the petition herein. The petition alleged, in addition, that Petitioner was the party directly interested in this proceeding and that parties in addition to the Respondent Court who were interested and who would be affected by the petition were The People of the State of California. It was alleged that the petition for writ of prohibition was filed with the court, no appeal lying from the order of the Respondent Court denying the motions to enter a plea of once in jeopardy and to dismiss the aforesaid amended complaint, and that Petitioner has no other plain, speedy or adequate remedy at law.

XV

For all of the foregoing reasons, Petitioner prayed that an alternative writ of prohibition be issued, restraining the Respondent Court, its officers and agents, and all persons acting by and through its orders, from taking any further proceedings or steps, including trial, as regards this Petitioner in *People of the State of*

California v. Edward Lee Bailey, James Samuel Lytell, Vincent Miranda and Walnut Properties, Inc., No. NM 73 06675, in the Municipal Court of the North Orange County Judicial District, County of Orange, State of California, until further order of the court, and that Respondent Court be directed and required to show cause before the court, at a specified time and place, why it should not be absolutely and forever restrained from taking any further proceedings against, or making any other orders affecting, Petitioner herein, and for such other and further relief to which the Petitioner may be entitled.

XVI

On October 15, 1974, the Superior Court of the State of California for the County of Orange, the Honorable MARK A. SODEN, Judge Presiding, declined to issue the prayed for alternative writ of prohibition and order to show cause, without written opinion (*Vincent Miranda v. Municipal Court*, No. 219909).

XVII

Unless restrained by this Court, Respondent Court will proceed to try Petitioner on the said amended complaint, commencing October 21, 1974.

XVIII

Respondent Court has no jurisdiction to proceed with the trial of said action against Petitioner for the reasons set forth in paragraphs VII, XI and XII of this petition.

XIX

Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, no appeal lying from the denial by Respondent Court of Petitioner's motion to dismiss the said amended complaint.

XX

Petitioner avers that he has not committed the offense charged in the complaint herein and he is innocent of any such offense, and that at all times acted lawfully and within constitutionally protected areas of conduct.

WHEREFORE, Petitioner prays that this Court issue an alternative writ of prohibition, restraining Respondent Court from proceeding to try Petitioner VINCENT MIRANDA in the action entitled *People of the State of California v. Edward Lee Bailey, et al.*, No. NM 73 06675, and to show cause before this Court, at a time and place to be designated by this Court, why it should not be permanently restrained from so doing, and for such other and further relief as to this Court seems just, and for a temporary stay restraining Respondent Court from proceeding to try Petitioner VINCENT MIRANDA in the said action pending consideration by this Court of the Petitioner's application for an alternative writ of prohibition.

DATED: October 16, 1974.

FLEISHMAN, McDANIEL, BROWN
& WESTON

BY /s/ John H. Weston
JOHN H. WESTON
Attorneys for Petitioner

Memorandum of Points and Authorities in Support of Petition for Writ of Prohibition.

In the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Vincent Miranda, Petitioner, vs. Municipal Court of the North Orange County Judicial District, County of Orange, State of California, Respondent, People of the State of California, Real Party in Interest. No. 4 CIV 13914.

I

THE PRESENT PROSECUTION AGAINST PETITIONER VINCENT MIRANDA IS BARRED BY THE DOUBLE JEOPARDY, COLLATERAL ESTOPPEL, DUE PROCESS, AND FREE SPEECH AND PRESS PROVISIONS OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 13 OF THE CALIFORNIA CONSTITUTION, AND BY THE PROVISIONS OF PENAL CODE SECTION 1387.

The doctrine of collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson,* 397 U.S. 436, 443, 90 S.Ct. 1189, 1194 (1970). See also, *Simpson v. Florida,* 403 U.S. 394, 91 S.Ct. 1801 (1971); *Harris v. Washington,* 404 U.S.55, 92 S.Ct. 183 (1971).

The verified petition herein shows that the issue of obscenity of the film "Deep Throat" has been finally litigated between Petitioner VINCENT MIRANDA and The People of the State of California in the prior Beverly Hills trial. Although that trial resulted in a hung jury, nine to three for acquittal, the action was subsequently dismissed by the Court pursuant to Penal Code Section 1385 on motion of the prosecutor made on the grounds that the State was unable to prove the obscenity of the film. Penal Code Section 1387 provides that:

> "An order for the dismissal of the action, made as provided in this chapter, [pursuant to Penal Code §1385] is a bar to any other prosecution for the same offense if it is a misdemeanor. . . ."

Accordingly, the former trial and dismissal operates as a final judgment between VINCENT MIRANDA and The People of the State of California with respect to the charge that exhibition of the film "Deep Throat" constitutes a violation of the state obscenity statute. The statutory and constitutional provisions discussed above preclude another trial of the same charge. Since the substantive law of obscenity in the State of California requires that alleged obscenity be measured against statewide standards, the fact that the present prosecution alleges exhibition of the film in Orange County rather than Los Angeles County does not affect the applicability of the doctrines of double jeopardy and collateral estoppel. See, *In re Giannini,* 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968); *Miller v. California,* 413 U.S.15, 93 S.Ct. 2607.

II

RESPONDENT COURT IS WITHOUT JURISDICTION OF THE OFFENSES CHARGED AGAINST PETITIONER VINCENT MIRANDA IN THE AMENDED COMPLAINT HEREIN BECAUSE THE SAID PROSECUTION WAS BROUGHT IN BAD FAITH FOR THE PURPOSE OF HARASSING SAID DEFENDANT, AND THE INSTANT PROSECUTION ACCORDINGLY DEPRIVES SAID PETITIONER OF DUE PROCESS OF LAW, DENIES HIM THE EQUAL PROTECTION OF THE LAWS, AND ABRIDGES THE EXERCISE OF FREEDOMS OF SPEECH AND PRESS, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 11, 13 AND 21 OF THE CALIFORNIA CONSTITUTION.

Miranda v. Hicks,
U.S.D.C. C.D. Cal. Civil No. 73-2775-F (June 4, 1974, as amended September 30, 1974).

III

THE PRESENT PROSECUTION AGAINST PETITIONER VINCENT MIRANDA IS BARRED BY THE DOCTRINE OF RES JUDICATA, THE UNCONSTITUTIONALITY OF PENAL CODE SECTION 311, ET SEQ. HAVING BEEN DETERMINED ON THE MERITS IN A FINAL JUDGMENT RENDERED BETWEEN VINCENT MIRANDA AND CECIL HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, IN THE ACTION ENTITLED

MIRANDA v. HICKS, U.S.D.C. C.D. CAL. CIVIL NO. 73-2775-F, THE FINAL JUDGMENT HAVING BEEN ENTERED ON JUNE 4, 1974, AND AMENDED ON SEPTEMBER 30, 1974.

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94 S.Ct.1209 (See, concurring opinion of Mr. Justice White, 94 S.Ct. at 1224);

28 U.S.C. § 2201
[A "declaration shall have the force and effect of a final judgment or decree".]

CONCLUSION

For all of the foregoing reasons, a writ of prohibition should issue.

Respectfully submitted,

FLEISHMAN, McDANIEL, BROWN & WESTON
BY /s /John H. Weston
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Supreme Court, U. S.
FILED
JAN 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANTS' OPENING BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANTS' OPENING BRIEF.

Opinions Below.

The Opinion of the three-judge court issued on June 4, 1974, is set forth as Appendix A to the jurisdictional statement. The Supplemental Opinion of the three-judge court issued on September 30, 1974, is set forth at pages 121 and f. of Appendix.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1253 in that this is a case within the purview of that statute for the following reasons:

On November 29, 1973, Appellee Vincent Miranda, doing business as Walnut Properties and Pussycat Theatre Hollywood, a California corporation, filed a "Complaint for Damages, Declaratory Relief and Injunction" pursuant to 28 U.S.C. 1343(3) and (4), 42 U.S.C. 1983, 28 U.S.C. 2201 and 2202, and 28 U.S.C. 2281 and 2284. Appellants were notified of the pending action although they were not served with the summons and complaint until January 14, 1974.

On December 28, 1973, the Honorable Lawrence T. Lydick, District Judge, to whom the case was originally assigned, issued an order denying Appellee's request for a temporary restraining order and for return of the films seized but concluded that:

> The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification

> and certification in accordance with 28 U.S.C. sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

The three-judge court which was convened pursuant to the above certification by its opinion and judgment entered on June 4, 1974 (Jurisd. Stat. A1-A18), held the California Obscenity Statutes to be unconstitutional and although it specifically did not enjoin pending state prosecution, it ordered the return of all evidence seized, further declaring that:

> The court retains full and complete jurisdiction over the parties and the causes of action for all purposes (Jurisd. Stat. A, p. 18).

On August 3, 1974, Judge Ferguson, a member of the three-judge panel, issued a temporary restraining order against further seizures pursuant to the above-retained jurisdiction and ordered Appellants to show cause why they should not be found in contempt for not having returned the seized copies. He further ordered them to show cause why further seizures and prosecutions should not be enjoined both as to "Deep Throat" and as to a new movie, "Devil in Miss Jones," and why all copies seized pursuant to search warrants issued after adversary hearing, on July 29, 30 and 31, 1974, should not be ordered returned. On August 12, 1974, an injunction against further seizures was issued. These orders show that although the Court did not "enjoin" operation of the state laws on paper, it acts in an injunctive manner in enforcing its "declaration."

Notice of Appeal was filed in that court on July 5, 1974.

The record on appeal duly certified to this Honorable Court on August 22, 1974, shows that Appellants made the following post-trial motions:

On July 14, 1974, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed a document entitled *Notice of Motion for Rehearing and for Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in Judgment and to Stay Judgment Pending Determination of that Motion.* This document (A. p. 91, R. pp. 531-532) consists of two pages and notifies the parties that *a motion will be made on July 1, 1974.* Appellants Cecil Hicks and Oretta D. Sears, also on June 14, 1974, filed notice *that on July 1, 1974,* Appellants, *pursuant to Rule 60(b)(1),* would move *for Relief from Judgment, for Rehearing and for Stay of Judgment Pending Determination of this Motion.*

The Points and Authorities filed in support of Appellant's notices of motions clearly show that Appellants only sought to have the Court reconsider its legal position and vacate the judgment on jurisdictional grounds. The original three-judge Court made a finding of fact that there were related state prosecutions pending in the state Courts and concluded that as a matter of law the existence of related prosecutions of the theater employees did not affect the Federal Plaintiffs' rights to declaratory relief. The Points and Authorities reiterate the existence of state prosecutions and ask the three-judge Court to reconsider its position as to its jurisdiction.

The Points and Authorities further pointed out that officers acting under authority of valid search warrants cannot be said to be in "bad faith." This argument was again one challenging a legal conclusion of the Court.

Finally, the impropriety of the order to return was reiterated. The requested relief was *specifically* designated to be under Rule 60(b)(1) of the Federal Rules of Criminal Procedure (A. p. 91, R. p. 533-A).

On September 30, 1974, in spite of the fact that the Points and Authorities show the intent to file a motion under Rule 60, because the *notice* of motion filed by some of Appellants *also* referred generally to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure, and because the *notice of motion* was coincidentally filed the *tenth* day after entry of judgment, the three-judge Court apparently elected to treat the "motions" as having been timely made under Rule 52 of the Federal Rules of Civil Procedure and entered its alleged supplemental opinion purporting to amend the judgment in such a way as to require Appellants to either nullify the Appellate jurisdiction of this Honorable Court or to once more be subjected to Federal contempt proceedings.

The supplemental opinion, in fact, makes no material changes to its prior order. It merely reiterates its prior findings that the California obscenity laws are unconstitutional and purports to amend the second part of the judgment by substituting the following order to the priorly made order to return the films:

> At the January 29th proceeding in the Municipal Court, the assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated."

The money was thereupon returned.

It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.

Paragraph *two* of the judgment of this court will be amended to read as follows:

2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Except as the judgment will be so modified, the motions of the defendants are denied (A. pp. 121 and f.).

Questions Presented.

1. Whether the *Miller v. California* decision issued by this Honorable Court on July 25, 1974, dismissing "for want of a substantial federal question" an appeal from a post-*Miller* conviction under the California Obscenity Statutes is a decision on the merits as to the constitutionality of the California Obscenity Statutes which is binding on lower Federal courts.

2. Whether the Federal District Court erred when it refused to abstain from adjudicating constitutional validity of the California Obscenity Statutes where state prosecutions were pending against representative agents of the Appellees.

3. Whether the Federal District Court erred when it refused to abstain from adjudicating constitutional

validity of the California Obscenity Statutes where state criminal prosecutions against Appellees had been filed eight days after the three-judge court had been constituted and were pending at the time the court issued its declaratory judgment.

4. Whether the doctrine of equitable abstention is applicable where federal action would have a disruptive effect upon a state's criminal processes and has the effect of encouraging disobedience of validly issued orders of a state court and the further effect of encouraging defendants in state proceedings to refuse to litigate in state courts.

5. Whether the Federal court can properly order Appellants to return items seized under order of validly issued search warrants and which are entered as evidence in cases presently pending in the state courts and which are under the physical *or* constructive custody of the state court.

6. Whether the three-judge court abused its power in making a finding that Appellants had harassed the Appellees without allowing for an evidentiary hearing, ordering the matters submitted on affidavits and determining the factual issue in a manner contrary to the determination of the one judge who under the statute should have been a member of the panel.

7. Whether the court erred in determining that searches conducted under authority of duly issued search warrants constituted harassment as a matter of law.

8. Whether failure to follow the procedures mandated by 28 U.S.C. 2284 vitiates and voids the injunctive orders of the court.

Statutes Involved.

California Penal Code Sections 311, 311.2, *et seq.* and California Penal Code Sections 1526, 1536, 1539, and 1540 are set forth as Appendices to the jurisdictional statement.

Statement of the Case.

On November 23, 1973, the Honorable John H. Smith, Jr., Judge of the Municipal Court, Central Orange County Judicial District, along with several officers from the Buena Park Police Department, viewed a film entitled "Deep Throat" at the Pussycat Theatre owned by Appellees in Buena Park, California. Based on his viewing of the film, Judge Smith felt there was probable cause for believing the film to be obscene and issued a search warrant for the seizure of the film (A p. 36, R. p. 221).

That same day, November 23, 1973, at about 4:30 p.m., Buena Park police officers made a seizure of another copy of "Deep Throat" which was again being shown at Appellees' theater. The seizure was made pursuant to a second search warrant signed by Judge Smith. The affidavit of said warrant stated that the second copy of the film in fact differed from that seen by Judge Smith as there were additional scenes of sexual activities not present in the first film (A. p. 40, R. pp. 223-227).

Later that day a third seizure of a copy of the film "Deep Throat" was made, based on a third search warrant signed by Judge Smith, who had personally returned to the theater again to view the film. During this viewing, Buena Park Police Officer Fontecchio sat with the judge and pointed out differences between the copy being viewed and the previously seized copies.

Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further ordered the officers to seize all monies present in the theater, including money in the theater safe. Pursuant to the judge's order, the officers called in a licensed locksmith who opened the floor safe of the theater, from which some $4,000 was seized (A. p. 40, R. pp. 223-227).

On Saturday, November 24, 1973, the Buena Park police officers deposited with Judge Smith all items which had been seized pursuant to the three warrants (A. p. 41, R. p. 222). Also on that date they observed a fourth copy of the film "Deep Throat" which was being shown at Appellees' theater. The officers saw the film and noted that this fourth film was different from the seized copies. They reported the differences to Judge Smith who issued a search warrant and a fourth seizure of the film took place (A. p. 41, R. pp. 223-227).

On Monday, November 26, 1973, in the Orange County Superior Court, the People of the State of California applied for and were granted a temporary restraining order and order to show cause in respect to a determination of obscenity of the movie "Deep Throat" (A. p. 64, R. pp. 17-18). In its order to show cause, the Superior Court of Orange County ordered Petitioners to appear and show cause five days later why all copies of the film "Deep Throat" in their possession in Orange County should not be ordered seized as being obscene. The order further provided that the hearing on the issue of obscenity could be had at the request of Petitioners at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice (A. p. 65, R. pp. 17-18). At Petitioner's request, at 2:30 p.m. on

that same day a hearing was had in Department 21 of the Orange County Superior Court, before the Honorable Byron K. McMillan, the judge who had issued the order to show cause and temporary restraining order (A. p. 22, R. pp. 12-16).

Attorney David M. Brown appeared at said hearing on behalf of Petitioners. He argued lack of jurisdiction of the Orange County Superior Court to hold such a hearing (A. p. 68, R. p. 283). He filed with the Orange County Superior Court a short document entitled "Reservation of Federal Constitutional Question" in which he stated, "Defendants . . . reserve all federal constitutional claims for purposes of federal jurisdiction." (A. p. 75, R. p. 26). Judge McMillan of the Orange County Superior Court ruled that jurisdiction was present, at which time Mr. Brown refused to submit to the jurisdiction of the state court (A. p. 72, R. p. 310). The matter was recessed until the following morning at 9:00 a.m. for the taking of evidence and Mr. Brown was advised that if Petitioners made no appearance, the hearing would be held in their absence.

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence the court ruled that the film "Deep Throat" was obscene beyond any reasonable doubt and issued an "order of seizure after adversary hearing" directing officers to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theatre or which were to be found there in the future, and to bring same before the court (A. p. 74, R. pp. 324-325). This order was served upon the theater that very day, though no seizure was made as no copies of the film were present.

Also on *November 26, 1973*, a criminal complaint was filed against the agents of Petitioner Miranda who were managing the theater and showing the films (A. p. 67, R. p. 285). The prosecution was continued several times and over objection of Appellants allegedly to allow for a final determination of the federal proceedings (R. pp. 542-548).

On November 29, 1973, Petitioner Miranda filed a federal complaint for damages, declaratory relief and injunction (A. p. 7, R. p. 7). The case was assigned to Judge Warren Ferguson of the United States District Court, Central California District who disqualified himself (A. p. 20, R. p. 11). The case was thereafter transferred to Judge Lydick of that same court.

On December 28, 1974, an order denying a temporary restraining order was issued by Judge Lydick of the Federal District Court. The order reflects Judge Lydick's finding that the record was totally devoid of any showing of wrongdoing by Appellants:

> The record before us shows that on November 23 and 24, 1973, law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.
>
> Thereafter on November 26, 1973, defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared ob-

scene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973, at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff's corporation's theatre seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.

In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material is required (A. p. 57, R. pp. 182-185).

On January 8, 1974, an order designating the Honorable Ely, Ferguson and East as the three-judge court to hear the case was entered by Judge Chambers, Chief Judge for the Ninth Circuit (A. pp. 84-85) (The

order was forwarded to Appellants *on February 8, 1974*) (A. pp. 82-83, R. pp. 341-342).

On January 8, 1974, Mr. Bayley, the manager of the theater, filed a motion to suppress as illegally seized the four copies of "Deep Throat" in the North Orange County Municipal Court (A. p. 80, R. pp. 365-367). On that same date an amended complaint including the theater owner Mr. Miranda was signed and prepared. The Municipal Court record reflects that the amended complaint, though officially filed on January 15, 1974, had been prepared and signed on January 8, 1974 (A. p. 92, R. p. 574). Mr. Miranda and the theatre joined in the motion to suppress scheduled for hearing in the Municipal Court at that time (A. p. 76, R. pp. 365-367).

On January 14, 1974, the complaint filed in the Federal Court was officially served on appellants.

On January 29, 1974, Cecil Hicks and Oretta Sears filed their answer supported by certified documents and notarized declarations signed under penalty of perjury (essentially the same documents and affidavits presented to Judge Lydick in opposition to the temporary restraining order) (*Cf.* R. pp. 57-136 with R. pp. 215-334).

On January 29, 1974, the Orange County Municipal Court granted the motion to suppress as to two of the copies of "Deep Throat." It denied the motion as to the other two copies (A. p. 80).

On February 15, 1974, Appellants filed notice of appeal from the Orange County Municipal Court's order of suppression (A. p. 87, R. pp. 404-405).

On March 20, 1974, a memorandum was issued by Judge Ferguson on behalf of the three-judge court

ordering the issue of "harassment" submitted on affidavits and requesting additional points and authorities on the issue of constitutionality of the state statutes (A. p. 89, R. pp. 427-428). Neither Mr. Miranda nor Cecil Hicks and Oretta Sears submitted additional affidavits so that the three-judge court had before it only the original affidavits presented to Judge Lydick.

On June 4, 1974, the three-judge court issued its memorandum opinion totally ignoring Judge Lydick's findings, totally ignoring the existence of the adversary hearing in the state court, totally ignoring the criminal proceedings pending in the state court, totally ignoring the fact that one of defendants, Deputy District Attorney Sears, was improperly named since her sole involvement was the *preparation* of the state court order to show cause regarding the adversary hearing, and concluding that (a) California Penal Code Sections 311, *et seq.*, are unconstitutional, (b) that *People v. Enskat*, 33 Cal.App.3d 900, improperly interprets prior California decisions by the use of "specious arguments," (c) that the "*objective*" facts set forth in the first part of the opinion clearly demonstrate "bad faith and harassment" and (d) that requiring the state to return *all* copies of the film "might have" some disruptive influence on a possible future prosecution—*or upon prosecutions of others*—but (e) since the state statute has been declared unconstitutional the property is no longer evidence and/or contraband and "it can and is ordered returned." (Jurisd. Statement A, pp. 1-21).

A *notice* that a motion for relief from judgment to amend and alter judgment and to correct errors in the judgment pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (d), 60(a) and (b) and 62 would be made *on July 1* was filed in the Federal action by

Gourley, Fontecchio, Hafdahl and Harrison on June 14, 1974 (A. p. 90, R. p. 531). Petitions for Rehearing under Rule 60(b) of the Federal Rules of Civil Procedure were filed by Hicks and Sears (A. p. 91, R. p. 533A).

The theater resumed the showing of "Deep Throat" and added "Devil in Miss Jones" as a second feature. No arrests or seizures were made while Appellants attempted to determine the "scope" of the Federal declaratory judgment order.

On July 25, 1974, however, the United States Supreme Court issued its opinion in *Miller v. California*, 41 L.Ed.2d 1158, dismissing the appeal for want of a substantial federal question.

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of all the seizures in this criminal action and acknowledged that a valid adversary hearing on the issue of obscenity had been had (A. p. 131).

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Orange County Superior Court that "Deep Throat" was still being shown and asked whether the court wished to issue a warrant for its seizure. An adversary hearing having been had on November 26 and 27, 1973, the court issued the search warrant and several seizures occurred between Monday, July 29 and Friday, August 2, 1974, each on a separate warrant and each being the source of a new prosecution against the theater, the employees, etc. (A. pp. 106-112). Those prosecutions are presently pending.

In addition, on July 30, 1974, the state judge, upon affidavit of a police officer, issued a search warrant for the seizure of the film "Devil in Miss Jones"

which was being shown at the same theater in conjunction with "Deep Throat." (A. pp. 108-109). On July 31, 1974, a second search warrant was issued and a second copy seized (A. p. 110). This search warrant was issued in conjunction with an order to show cause requesting defendants to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at defendants' request, and show cause why all copies in the possession of the theater should not be seized. The warrant further provided that if defendants had no additional copies available for showing, the second copy would be returned pending the Friday hearing. As to each seizure, state criminal complaints have been filed and are pending (A. p. 118).

On Friday, counsel for Petitioners appeared before the Orange County Superior Court and stated that he did not believe the state court had jurisdiction to hold the hearing and when the court declared itself ready to proceed on the merits, the attorney walked out of the courtroom. The state court viewed the movie, heard evidence and issued its order of seizure for all copies of the film in the theater's possession (A. pp. 110-113).

On August 1, 1974, a message was left with Deputy District Attorney Sears which stated that Mr. Brown had an appointment with Judge Ferguson for 10:00 a.m. on Saturday morning, August 3, 1974, and that he would request an order (unspecified) at that time. On August 2, 1974, when Mr. Brown's associate appeared in the state court, no service was made of any type and nothing was said about the Saturday appointment to Appellant Sears or to other Appellants (A. p. 119).

On Saturday, August 3, 1974, the Federal Court issued an order to show cause *in re* contempt and a temporary restraining order. All defendants in the Federal action were ordered to appear on August 12, 1974, and show cause why they should not be found in contempt of the order to return issued in the declaratory judgment of the three-judge court. Seizures of the movies "Deep Throat" and "Devil in Miss Jones" were temporarily restrained as violative of the June 4, 1974, order and defendants were further ordered to show cause why future seizures and prosecutions should not be prohibited and all items seized ordered returned (Jurisd. Stat. E). In all other respects Appellees' request was denied.

On August 12, 1974, Judge Ferguson, one of the three-judge panel, after hearing argument, indicated that the three-judge court was considering the issue of whether the July 26, 1974, *Miller v. California* opinion of this Court required reversal but further indicated that the issue was a "difficult one" and that he did not know *when* an opinion by that court would be forthcoming.

On August 22, 1974, a notice of direct appeal to the United States Supreme Court pursuant to 28 U.S.C. 1253 having been duly filed, the appropriate filing fees having been duly paid, the record on appeal having been duly certified and the *jurisdictional statement* having been duly served, *the appeal was docketed with the United States Supreme Court.*

On September 30, 1974, the three-judge court issued its supplemental opinion and its purported amended judgment in which the court reiterated its finding that the California obscenity statutes are unconstitutional

on the theory that the dismissal "for want of a substantial federal question" of the appeal in *Miller v. California,* ..... U.S. ....., 41 L.Ed.2d 1158 by the United States Supreme Court is not a decision on the merits of binding precedential value (A. pp. 121 and f).

The three-judge court, in that opinion, modified the judgment as follows:

> At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.
>
> It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.
>
> Paragraph *two* of the judgment of this court will be amended to read as follows:
>
> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park.
>
> Except as the judgment will be so modified, the motions of the defendants are denied.

Summary of Argument.

A. The complaint sought injunctive relief alleging unconstitutionality of California Penal Code Section 311.2 and the convening of a three-judge court was mandated by 28 U.S.C. 2281. The order issued by the three-judge court on June 4, 1974 requiring the return of all seized copies of the film is injunctive in nature. The modified order issued by the court on September 30, 1974 requiring the prosecuting authorities to *in good faith* petition the state court for the return of the films is also injunctive. This type of order interferes with the proper enforcement of the state laws in that it requires an officer of the court to ask the state court to contravene the orders of a state court of higher jurisdiction; it presumes collateral appellate jurisdiction over the state courts; it requires the prosecuting authorities to forego the performance of their statutory duty under penalty of contempt. Both orders give this Honorable Court jurisdiction under the principles enunciated in *Perez v. Ledesma,* 401 U.S. 82 and *Allee v. Medrano,* ..... U.S. ....., 94 S.Ct. 2191.

B. The order of June 4, 1974 was a final and appealable order, in that the Petitions for rehearing filed by Appellants were not of the type which deprive the rule of finality. Moreover, injunctive orders are appealable under 28 U.S.C. 2253 even if not final. Since the modified order is before the court and nothing remains to be done in the court below and the primary issue is the jurisdiction of the three-judge court to act the court can properly consider the totality of the controversy and the order is "final" for purposes of the court's jurisdiction under the principles of *Hudson Distributors v. Eli Lilly & Co.,* 377 U.S. 386, 389 n. 4, and

Local No. 438 Construction and General Laborers Union v. Curry, 371 U.S. 542, 548-552.

C. Where, as here, the three-judge court was improperly convened and there is a complete lack of jurisdiction in the district court because the complaint does not present a substantial federal question, the court on an appeal under 28 U.S.C. 1253 has the power to reverse the decree of the three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont Northern R. Co. v. United States*, 280 U.S. 469; *Smallwood v. Gallardo*, 275 U.S. 56, 62.

D. Where, as here, there is identity of interest between the federal plaintiff (the theater owner) and the defendants in the state court criminal proceedings (the theater manager) and the injury alleged by the federal plaintiff in his federal complaint clearly consists of the very same facts which underly the state criminal complaint and must thus be decided by the state court, the federal plaintiff has the ability to vindicate his rights in the state court. Conflicting decisions by the state and federal courts are unavoidable and comity requires that the criminal proceedings pending in the state court be imputed to the federal plaintiff. *Steffell v. Thompson*, 415 U.S. ...., 94 S.Ct. 1209 (U.S. March 19, 1974); *Allee v. Medrano*, ... U.S. ...., 94 S.Ct. 2191, 2208 (concurring opinion). Interference by the three-judge court which is admittedly dependent on the determination that no state proceedings were pending at the time the action was filed is therefore improper and abstention was mandated.

E. When, as in the case at hand, state criminal proceedings were filed against the federal plaintiff *one day*

after the filing of the federal complaint, and long before the three-judge court heard the matter, criminal proceedings are pending, the principles of *Younger v. Harris*, 401 U.S. 37 apply. This conclusion is mandated by the provisions of 28 U.S.C. 2284(5), by practical considerations such as the need for investigation of the involvement of parties (theater owners, publishers, etc., who are not present on the premises) and is supported by the rationale and the holdings of *Allee v. Medrano, supra; Steffel v. Thompson, supra* (concurring opinion) and *Perez v. Ledesma*, 401 U.S. 82, 103. The court's determination that the filing of criminal proceedings against the federal plaintiff one day after the filing of the federal complaint did not preclude intervention is erroneous. The pending criminal complaint against the federal plaintiff at the time of the federal court's hearing on the matter mandated abstention.

F. Dismissal of an appeal for want of a substantial federal question is a decision on the merits and indicates that a claim that the state statute is unconstitutional *does not* present a "substantial federal question." The conclusion of its binding value as precedent is inescapable in that where a decision of a state court is based on a criminal statute the ground of appeal under 28 U.S.C. Section 1257(2) is the claimed invalidity of the state statute. A declaration that the claim of unconstitutionality "does not present a substantial federal question" necessarily comports a ruling that the claim of unconstitutionality lacks merit. *Eaton v. Price*, 360 U.S. 246; *Ahern v. Murphy* (C.A. 7, 1972) 457 F.2d 363, 365; *Cross v. Bruning* (C.A. 9, 1969) 413 F.2d 678. The *Miller v. California*, ... U.S. ...., 41 L.Ed.2d 1158 decision of this Honorable Court, therefore, is controlling, requires a finding that the complaint fails in

that it does not present a substantial federal question, and mandates dismissal of the complaint.

G. Only a court composed in the manner mandated by 28 U.S.C. 2284 has jurisdiction to grant injunctive relief. The requirements of the statute underly the totality of the procedure in that the judge to whom the case is originally assigned is the one who determines the facts and who controls the case. He is also the one to whom the case is returned after the three-judge court is dissolved and who has the responsibility for the adjudication of collateral and ancillary proceedings. (See *e.g.*, *Hamilton v. Nakai* (C.A. 9, 1971) 453 F.2d 152; *Public Service Commission v. Brashear*, 312 U.S. 621.) The failure of the Chief Judge to follow the mandates of the statute and his unexplained removal of the judge who certified the case from the three-judge panel after that judge had made factual findings in favor of appellants, deprived appellants of due process and resulted in an improperly constituted court without authority to grant injunctive relief.

H. The three-judge court found that appellants' acts [consisting of seizures of four copies of a film under four warrants issued by a magistrate who had personally seen at least two of the versions seized and followed by an adversary hearing at which the film was found to be obscene beyond any reasonable doubt] constituted harassment. The fact that the state court on appeal declared the seizures to have been proper, and the adversary hearing to have been properly conducted; this Honorable Court's dismissal of the *Miller v. California, supra*, appeal; the finding in *People v. Enskat*, 33 Cal. App.3d 900 that the California statute is constitutional, and Judge Lydick's finding that the seizures were con-

stitutionally proper, *preclude* a finding that the criminal proceedings were instituted in "bad faith" and without the hope of obtaining a conviction and render the finding of the three-judge court erroneous as a matter of law. Abstention was therefore mandated under *Younger v. Harris*, 401 U.S. 37.

I. California Penal Code Section 311.2 as construed by prior decisions of the California Supreme Court and by the California Appellate Courts specifically defined obscene material as material depicting or describing explicit acts of masturbation, oral copulation, sadism, masochism and graphic depiction of sexual activity as constituting "hard core" pornography. The statute, therefore, is constitutional under the *Miller v. California*, 413 U.S. 15, test as explained in *Hamling v. United States*, ... U.S. .....

ARGUMENT.

I.

The Jurisdiction of This Honorable Court Is Properly Invoked in That Both Orders Are Injunctive in Nature Within the Meaning of 28 U.S.C. 1253.

The original order of the court, issued on June 4, 1974, ordered the return of films seized under state search warrants.

The practical effect of the court's order to return all copies of the film was to collaterally overrule the state appellate court finding that the search warrants were valid and validly issued (R. p. 319). Counsel for the theater owner and the three-judge court argued that interference with the state proceedings was minimal because only one copy was needed as evidence (A. p. 94, R. p. 594). Such an argument ignores reality. Interference with the state court trial exists *primarily* because under California Law items seized under a validly issued search warrant are in *custodia legis* even when they are in the physical custody of the police (*People v. Superior Court*, 28 Cal.App.3d 600).

Where, as here, the items are in the direct custody of the state court (who is not even made a party to the proceedings) (A. p. 37, R. p. 72) the order to return can only be considered as directed to the state court. This type of interference, subjecting as it does the prosecuting authorities to possible contempt proceedings of *both* courts, is indeed a type of interference which is intolerable. Additionally, comity and the interrelated principles of federalism can hardly be said to have been served by allowing a lower federal court to have appellate jurisdiction over the orders of the state appellate courts.

Moreover, the argument of both the three-judge court and of the theater owner ignores crucial facts. The four films were seized under four separate warrants *because* the copies shown were different one from the other. Each copy of the film would thus have *had* to be shown to the jury in the state prosecution unless a stipulation was obtained from counsel that *for purposes of trial* the four copies would be considered to be identical. Such a stipulation was in fact entered into during the state municipal court proceedings on the motion to suppress (A. pp. 78-79, R. pp. 371-390).

The modified order of September 30, 1974, is no less disruptive. There, while agreeing that technically the prosecution might have a point in that the films are in the custody of the state court, the federal court modified the judgment by striking the prior order to return and by substituting an order requiring the prosecution to *in good faith* petition the state court for the return of the films. The prosecutor is an officer of the state court and bound by his oath to uphold the orders of the state courts. The prosecutor is the one whose duty it is to defend the interests of the People of the State of California. Under the particular facts of this case the municipal court, at the hearing on the motion to suppress, granted the theater owner's motion as to two of the copies because it found the last two warrants insufficient on their face "because" they did not allege probable cause to believe the films were different (A. p. 86). The issue of obscenity was not raised by the theater owner nor determined by the municipal court (A. p. 77, R. pp. 365-367). Neither that court nor the three-judge court viewed the films to ascertain whether the films were *in fact* different (A. pp. 87-88).

The prosecution appealed the suppression order (A. p. 87, R. pp. 404-405). The state appellate court held the four seizures to have been proper and declared the films contraband (and therefore non-returnable) (A. p. 131).

An order to the prosecution to petition the municipal court for the return of the films and to do so *in good faith* asks the prosecution to defy the final order of the appellate court. It asks the prosecution to renege the very law he is sworn to uphold. It asks the prosecution to request the municipal court to defy the order of the state court. The threat of possible contempt proceedings in federal court interjects an element of *self* interest and raises a conflict of interest sufficient so as to require the attorney general of the state to step in and represent the interest of the people of the state. It thus *precludes* the prosecutor from performing the duties of the office to which he has been elected.

The supplemental opinion of the three-judge court justified the issuance of its order on the basis that a similar proceeding was used to return the money seized. This argument ignores the fact that the return of the money was mandated by *Buker v. Superior Court*, 25 Cal.App.3d 1085 where the state appellate court held that *noncontraband* items such as money could not be retained after a stipulation that copies or photographs could be used as evidence. More important, it ignores that fact that an order of the appellate court declared the film contraband and nonreturnable. Both types of injunction differ from the injunction in *O'Shea v. Littleton*, ... U.S. ...., only in their context. Both are similar to the *O'Shea* injunction in that both purport to punish as contempt actions of judicial of-

ficers taken during the course of state criminal proceedings.

Both types of orders are similar to the order to return issued in *Perez v. Ledesma*, 401 U.S. 82, in which as pointed out by Mr. Justice Douglas in *Allee v. Medrano, supra*, at note 8, the jurisdiction of this Honorable Court was properly invoked. There as here:

> The District Court went on to determine that the arrests of the plaintiffs and the seizures incident thereto were unconstitutional because no prior adversary hearing had been held, 304 F. Supp. 662, 667, and therefore issued an order suppressing the evidence in the state court case. We reviewed that order on the merits, assuming it was properly before us as an appeal "from an order granting or denying . . . an interlocutory or permanent injunction in any civil" action required to be heard by a three-judge court. See 401 U.S., at 89 (concurring opinion). The basis for ancillary jurisdiction here is at least as compelling.

Mr. Justice Berger's concurring and dissenting opinion points out that while he disagrees with the majority on the issue of the court's jurisdiction in *Medrano, supra*, he does so because he believes the *Medrano* case to be distinguishable from *Perez v. Ledesma:*

> Although the District Court in *Perez* stated that it held that state statute to be facially constitutional, the decision of the District Court there that the arrests and seizures were unconstitutional appears in fact to have derived from a broad condemnation of obscenity statutes, including the state statute dealt with in that case, without provisions incorporated therein protecting against criminal liability for acts occurring prior to an adversary

judicial determination of obscenity. Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 667 (E.D.La. 1969). In effect, then, the District Court in *Perez* acted broadly to render a nullity the Louisiana statute, see 304 F.Supp., at 673 (Rubin, J., dissenting), and we, therefore, properly had jurisdiction over the appeal and we properly ruled on the question of whether the District Court could have interfered with state court criminal proceedings by invalidating arrests and seizures made without any prior adversary hearing.

Both opinions of the three-judge court in this case make clear that the injunctive orders stem from and are inextricably bound with their finding that the state statute is unconstitutional. Here as in *Perez v. Ledesma* this Honorable Court has jurisdiction to review the merits.

II.

The June 4, 1974, Decision Was Not Robbed of Finality by the Filing of Notices of Motions.

Appellants submit that the supplemental opinion and the modification of judgment are void because the three-judge Court had lost jurisdiction over the action since the notice of appeal had been timely filed on July 5, 1974 (a Monday). The record on appeal had been duly requested and the appeal docketed with this Honorable Court on August 22, 1974—nearly ten days prior to the entry of the supplemental opinion and of the amended judgment. See *e.g. Sumida v. Yumen,* (C.A. Hawaii 1969) 409 F.2d 654, cert. den. 405 U.S. 964; *O'Brien v. Avco* (D.C. N.Y. 1969) 309 F.Supp. 703; *Hogg v. United States* (C.A. Ky. 1969) 411 F.2d 578.

In the analogous case of *United States v. Frank B. Killian,* 269 F.2d 494, the United States Court of Appeals for the Sixth Circuit, pointed out that the notice of appeal operated to divest the district court of jurisdiction to rule on the government motion to reconsider, brought under Rule 60(b). The Court stated:

> Next to be considered is appellee's opinion here to dismiss the appeal as prematurely brought. Appellee's argument, briefly put, is that the Government's motion to reconsider and for relief from judgment suspended the finality of the order of dismissal, and so made the notice of appeal premature. There is no merit in this point. See: Fed. R.Civ.P. rule 60(b)(6): *Raughley v. Pennsylvania R. Co.,* 3 Cir., 1956, 230 F.2d 387.
>
> The Government's notice of appeal, filed August 4, 1958, operated to transfer jurisdiction to this court (Fed. R.Civ.P. rule 73), and thereafter the District Court had no jurisdiction of the cause, other than to act in aid of the appeal as empowered by the Federal Rules of Civil Procedure. *In re Federal Facilities Realty Trust,* 7 Cir., 1955, 227 F.2d 651, 654. Having no jurisdiction to entertain the Government's motions for reconsideration and for leave to amend while an appeal was pending, the District Court's order overruling those motions was a nullity.

In *Keohane v. Swarco Inc.,* 320 F.2d 429 the Court concluded that a notice of appeal transfers jurisdiction even where a timely motion had been made under Rule 52. The Court there states:

> In our judgment, the motion to amend was timely made. It tolled the running of the time for appeal in No. 15,284. Rule 73; *Leishman v.*

Associate Wholesale Electric Co., 318 U.S. 203, 63 S.Ct. 543, 87 L.Ed. 714; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160. Since the District Court had not passed upon the motion to amend at the time the notice of appeal was filed, the judgment of dismissal was not final. The appeal was, therefore, premature. *Reconstruction Finance Corp. v. Mouat*, 184 F.2d 44 (C.A. 9); *Segundo v. United States*, 221 F.2d 296 (C.A. 9).

The taking of the appeal even though from an interlocutory nonappealable order nevertheless transferred jurisdiction to the Court of Appeals. The orders entered by the District Court on January 16th, March 6th and March 14, 1963 were null and void since that court was without jurisdiction to make them after the appeal had been taken. *Merritt-Chapman & Scott Corp. v. City of Seattle*, 281 F.2d 896 (C.A. 9); *United States v. Frank B. Killian Co.*, 269 F.2d 491 (C.A. 6); *Hirsch v. United States*, 186 F.2d 524 (C.A. 6).

The three-judge court should not be allowed to defeat the jurisdiction of this Court to hear a matter of so great an impact to the State of California by being allowed to consider a notice of motion of judgment as sufficient to satisfy the requirements of Rule 52 of the Federal Rules of Civil Procedure because served and filed ten days after entry. Although the Federal Court has great discretion in waiving defects in pleadings, it should not be allowed to construe a motion to be other than what it is. Notifying the clerk of the party's intention to file a motion for new trial *does not* constitute the filing of a motion for new trial and does not extend the time for appeal [See *e.g.*, *Wagoner v. Fairview*

Consol. School Dist. No. 5 (C.A. Colo. 1961) 289 F.2d 480, cert. den. 368 U.S. 921]. A motion which asks for rehearing and for vacation of judgment cannot be treated as a motion to amend under Rule 52. Indeed, as has so often been stated, a motion under Rule 52 cannot be made to serve as a vehicle for rehearing (*Minneapolis Honeywell v. Midwestern Instrument* (D.C. Ill. 1960) 188 F.Supp. 248, affirmed 298 F.2d 36; *Heikkila v. Barber* (D.C. Cal. 1958) 164 F.Supp. 587; *Blair v. Delta Air Lines* (D.C. Fla. 1972) 344 F.Supp. 367).

Appellants' intended purpose, as to the type of motion they intended to file, is evidenced by the fact that the notices in conformance with Rule 3 of the Local Rules of the United States District Court, Central District of California, notify opposing party that the motion *shall* be made on July 1, 1974 (A. p. 90, R. pp. 531, 533A), a requirement which Rule 3 specifies is inapplicable to motions under Rule 52.

Similarly, neither notice of motion could in any way be considered as a motion under Rule 59 of the Federal Rules of Civil Procedure since the procedural requirements for such a motion which are set forth in Rule 17 of the Local Rules were deliberately bypassed.

Appellants further submit that even if the September 30, 1974 judgment were to be considered to have been properly entered, the prematurity of the notice of appeal should be disregarded as an irregularity not affecting substantial rights and should not be allowed to justify a dismissal of the appeal (See *Lemke v. United States*, 346 U.S. 325, 98 L.Ed. 3; *see also Curtiss Gallery and Library Inc. v. United States* (C.A. Cal. 1967) 388 F.2d 358; *Ruby v. Secretary of United States Navy* (C.A. 9, 1966) 365 F.2d 385).

III.

The "Finality of Judgment" Test Is Not Applicable to Cases Arising Under 28 U.S.C. 2281 in That the Court Has Jurisdiction Over Interlocutory as Well as Over Final Injunctive Orders.

Unlike other statutory provisions 28 U.S.C. 1253 allows for appeals from "an order granting or denying . . . an *interlocutory* or permanent injunction." The requirement of finality set forth in 28 U.S.C. 1257 is thus not applicable. Moreover, the basic issue for determination is the same in both the opinion of June 4, 1974, and that of September 30, 1974. The principles as to finality set forth by this Court in *Local No. 438 Construction and General Laborers Union v. Curry*, 371 U.S. 542, 548-552 are thus applicable since nothing remains to be done by the court below and unless review is had at this juncture, appellants "must face further proceedings in the [lower] court which the lower court has no power to conduct" *Curry, supra*, 371 U.S. at 550.

IV.

The Jurisdiction of the Three-Judge Court Is Obviously Lacking and the Court Can Resolve the Merits of the Controversy by Resolving the Jurisdictional Issue.

As most aptly pointed out by Stern and Grossman, *Supreme Court Practice*, Sec. 2.14, page 53:

> The three-judge-court procedure is not properly invoked unless the constitutional question raised is "substantial." *Ex-parte Poresky*, 290 U.S. 30; *Flast v. Cohen*, 392 U.S. 83, 91, n. 4. See Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 La. L. Rev. 813 (1959). "The lack of substantiality in a federal question may appear either because it is

> obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court, as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255; *Swift & Co. v. Wickham*, 382 U.S. 111, 115; *Zemel v. Rusk*, 381 U.S. 1, 6; *Bell v. Waterfront Commission*, 279 F.2d 853 (C.A. 2).

As thereafter pointed at Section 2.17 at page 70:

> If there is a complete lack of jurisdiction in the district court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the decree of a three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont & Northern R. Co. v. United States*, 280 U.S. 469. This power of the Court exists regardless of whether the three-judge court has entered a judgment for the plaintiff or the defendant. As long as a decree was entered on the merits, the Court has jurisdiction to reverse it and to order a dismissal for want of jurisdiction. See *Smallwood v. Gallardo*, 275 U.S. 56, 62; *Piedmont & Northern R. Co. v. United States, supra*, at 478.

In the case at hand, the jurisdictional statement and Judge Lydick's order (A. p. 57, R. pp. 182-185) show that the jurisdiction of the three-judge court is based on that Court's finding that the constitutionality of the California Obscenity Statutes presents a "substantial federal question." This Honorable Court in *Miller v. California*, ... U.S. ...., 41 L.Ed. 1158, dismissed an appeal presenting this identical issue "for want of a substantial Federal question." The basis for the three-

judge court jurisdiction in this case is thus clearly non-existent.

Although the three-judge court purported to also base its jurisdiction on the alleged findings of harassment, those findings are contrary to the ones made by Judge Lydick—the judge who certified the case as to the constitutionality of the California statute. Had the case not been certified, Judge Lydick's findings would unquestionably be unassailable on appeal. (See, *e.g., Sims v. Dial,* 350 F.Supp. 747 where a three-judge federal court rejected the "novel proposition of law" that actions paralleling the ones in the case at hand established bad faith harassment as a matter of law.)

Absent the presence of a substantial federal question as to the constitutionality of the statute, the three-judge court *and* Judge Lydick should have dismissed the complaint.

In light of the above factors, should the Court determine that it has no jurisdiction in this action, reversal of the three-judge court decree and remand with directions to dismiss the complaint for want of jurisdiction would seem the most appropriate means to restore order to the procedural nightmare created by the presently existing conflicting orders of the State and Federal Courts.

V.

The Federal Court Should Have Abstained From the Granting of Injunctive and Declaratory Relief Because State Criminal Proceedings Were Pending Against Agents in Privity With the Plaintiff.

The factual situation before the court presents the multitude of conflicts and potential problems which arise when the principles enunciated by this Honorable Court in *Younger v. Harris,* 401 U.S. 37 and *Steffel v.*

Thompson, 415 U.S. .... are not narrowly construed and strictly followed. Much of the confusion in the application of those principles stems from a misunderstanding of the proper function and intended purpose of 28 U.S.C. 2284 and of 28 U.S.C. 1201. Clarification of the proper use of those acts would no doubt help to prevent some of the existing abuses.

A complaint alleging unconstitutionality of a state statute is not per se sufficient to state a cause of action. It only sets forth the first requirement for federal court jurisdiction—the existence of a federal question; the alleged injury and the facts in support thereof are controlling on whether the complaint sets forth a cause of action, that is, a presently existing controversy warranting a specific type of relief.

Thus, allegations of past wrongful acts by state officials for example, without a showing of *some future threat* are possibly sufficient to allege a cause of action for damages under 42 U.S.C. §1983. They are, however, *insufficient* if the remedy sought is injunctive or declaratory in nature since both remedies seek to redress future wrongs.

Allegations that a statute is going to be enforced against "persons" *other than the plaintiff,* do not set forth a live controversy and are insufficient to allow for the grant of either injunctive or declaratory relief as to the plaintiff absent a relationship which allows the plaintiff to identify with the threat. As pointed out by Chief Justice Burger in *Allee v. Medrano,* .... U.S. ...., 94 S.Ct. 2191, 2208:

> There is an identity of interest between the Union and its prosecuted members; the Union may seek relief only because of the prosecutions

of its members; and only by insuring that such prosecutions cease may the Union vindicate the constitutional interests which it claims are violated. The Union stands in the place of its prosecuted members even as it asserts its own constitutional rights. The same comity considerations apply whether the action is brought in the name of the individually arrested Union member or in the name of the Union, and there is no inequity in requiring the Union to abide by the same legal standards as its members in suing in federal court. If the Union were unable to meet the requirements of *Younger,* its members subject to prosecution would have a full opportunity to vindicate the First Amendment rights of both the Union and its members in the state court proceedings. Any other result would allow the easy circumvention of *Younger* by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from *Younger* burdens.

Likewise, where the required injury sought to be alleged under 42 U.S.C. 1983 and 42 U.S.C. 1343 consists of past enforcement of an unconstitutional statute against persons other than the plaintiff and threatened future enforcement against other persons, the alleged injury is only sufficient to state a live controversy if the relationship between the plaintiff and the parties who suffered and will suffer the injury is such as to allow the plaintiff to act on behalf of those parties. If there is no identity of interests, the cause of action must fail because no controversy between the parties before the court has been presented (See *e.g., O'Shea v. Littleton,* .... U.S. ....).

Under the facts of the case under consideration, the theater owner did not allege that prosecution was threatened against him. His request for injunctive and for declaratory relief was specifically made to rest on four seizures conducted against *the theater and his employees* which he alleged were undertaken to prevent *the theater* from exhibiting the film (A. pp. 11-15, R. pp. 6-9). His right to federal relief is thus only determined through his relationship to the theater and to his employees.

If his relationship is insufficient, his right to relief fails because he has failed to allege the required personal interest. By the same token, if his relationship is sufficient to give him standing, it is sufficient because the theater, the employees, and the theater owner have identical interests.

A determination of whether criminal proceedings are pending in the state court is thus only meaningful if made in terms of criminal proceedings pending against the theater and the theater employees since the theater owner in this case "stands in the place of his [agents] even as he asserts its own constitutional rights" (*Allee v. Medrano, supra*).

In *Steffel v. Thompson,* 415 U.S. ...., 94 S.Ct. 1209, 1217 the propriety of granting declaratory and injunctive relief *when no state criminal proceeding is pending* is bottomed on the recognition that relevant principles of equity, comity and federalism "have little force in the absence of a pending state proceeding" because:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that

> circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity *in order to avoid becoming enmeshed in a criminal proceeding. Cf. Dombrowski v. Pfister,* 380 U.S. 479, 490, 85 S.Ct. 1116, 1123, 14 L.Ed.2d 22 (1965).

Where the federal complaint alleges illegality of the very seizures which procured the evidence upon which the state criminal complaints rest and the unconstitutionality of the state statutes under which the criminal complaint has been brought against agents of the federal plaintiff, federal intervention unavoidably results in duplicative legal proceedings, in conflicting decisions, and in opposite factual determinations by the state and federal courts.

The conflicts are perhaps best exemplified by the impossibility of giving *res judicata* effect to the decisions either of the state or of the federal court. Although, as pointed out by the majority of this Honorable Court in *Steffel,* the issue of whether a declaratory judgment has *res judicata* effect is not free from difficulty, it is apparent from the majority opinion and the concurring opinions in that case, that several members of the court agree that the federal declaratory judgment has *some res judicata* effect.

In the case at hand, the factual issues concerning the legality of the seizure were first determined by the state court at the adversary hearing (A. p. 74, R. pp. 283-319). Those same issues were re-presented, reargued and redetermined in the state criminal proceedings in a motion brought by the agents of Plaintiff *prior* to the filing of the federal action, a motion in which the federal plaintiff joined—*one day* after the filing of the federal complaint (A. p. 76, R. pp. 369-399). The state court determination was appealed and became final after the judgment of the three-judge court had issued but long before the three-judge court judgment became final. Under California law, the judgment of the three-judge court not being a final judgment would not and could not be given *res judicata effect* (*See, e.g., Woodbury v. Baeman,* 13 Cal. 634; *Di Nola v. Allison,* 143 Cal. 106). Additionally, the record shows that prior to *any action* being taken by the three-judge court, the three-judge court was informed by both parties that the validity of the seizures had been litigated by the state court (A. pp. 80-81, R. pp. 365-367). Under the circumstances, a proper applicability of the *res judicata* doctrine would have required the state court finding to be given *res judicata* effect in the federal court action.

Moreover, under the same state laws, one of the three prerequisites to the application of the *res judicata* doctrine is the jurisdiction of the former tribunal to determine the issue litigated (*See e.g., Sonnicksen v. Sonnicksen,* 5 Cal.App.2d 46; *Boggs v. Clark,* 37 Cal. 236). And a judgment void on its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or by strangers. It is simply a nullity and can be neither the basis nor evidence of any right whatever (*See e.g., Nagel v. P. &*

M. Distributors, Inc., 273 Cal.App.2d 176; *Fox v. Mick*, 20 Cal.App. 599). Where lack of jurisdiction appears on the face of the record, a judgment is void and can be attacked (*Scoville v. Keglor*, 29 Cal.App.2d 66; *Aldabe v. Aldabe*, 209 Cal.App.2d 453; *Baldwin v. Foster*, 157 Cal. 643; *In re Cohen*, 107 Cal.App. 288; *Whitwell v. Barbier*, 7 Cal. 54). The mere fact that the judgment has been issued by a federal court does not wholly immunize it from collateral attack. Thus in *Sato v. Hall*, 191 Cal. 510, for example, the California Supreme Court held the federal court judgment to be void and stated:

> The appellant contends that the order admitting him to citizenship is a final judgment of a court of competent jurisdiction, and that this judgment is conclusive as against collateral attack.
>
> This position is untenable. The judgment or certificate shows that the petitioner is a member of a yellow race, and this showing renders the judgment void unless its integrity is preserved by some one of the acts to be hereafter noted. If petitioner were ineligible to citizenship, and this ineligibility appeared upon the face of the judgment of the court admitting him to citizenship, that court was without jurisdiction and its judgment was void. . . .
>
> . . . we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizenship, that court was without jurisdiction and its judgment was void. (*In re Gee Hop* (D.C.), 71 Fed. 274; *In re Yamashita*, 30 Wash. 234 [70 Pac. 482].)

Where, as in a federal declaratory judgment action, the validity of the federal judgment depends on the existence of a "substantial federal question," the above cases would allow the state court to redetermine the jurisdiction of the federal court—that is, the substantiality of the federal question.

The net result is a proliferation of collateral attacks on each of the judgments and the utter breakdown of the principles of comity and of federalism *as well* as duplication of judicial proceedings. Avoidance of conflicts and of duplicative proceedings can only be achieved by imputing the existence of state criminal proceedings to the federal plaintiff in cases where common interest and activity afford him the ability to vindicate his rights in the state action and where claims to be adjudicated by the federal court are those same claims which are, at the same time, *sub judice* in ongoing state criminal proceedings. In such cases as Mr. Justice Burger in *Allee v. Medrano, supra,* makes clear:

> If there are state court prosecutions against the individual appellees or the Union under these statutes then *Younger* requirements must be met. If there are prosecutions against members of the Union under these statutes (and the Union asserts standing derivatively) then the *Younger* hurdle must be met for the reasons stated. If standing of individual appellees or the Union to challenge one of the statutes is based *solely* on threatened prosecutions, and the relief pursued below with respect to that statute is declaratory only then *Younger* does not apply. *Steffel v. Thompson, supra.* If appellees seek injunctive relief with respect to the operation or enforcement of a statute for the violation of which prosecutions are threatened, the question of whether *Younger* applies has not been an-

swered by this Court. *Steffel v. Thompson, supra,* .... U.S., at .... Finally, if the Union sues on the basis of injury to its members, since, as to a statute challenged, one member must, if suing on his own behalf, meet the requirements of *Younger,* the Union must do so, even though other of its members would not be so burdened if they had brought suit individually. The requirements of *Younger* are not to be evaded by artificial niceties.

The determination of the three-judge court that it had jurisdiction over the proceedings because state criminal proceedings were not pending is erroneous and requires reversal of the injunctive relief and of the declaratory relief.

VI.

The Federal Court Should Have Abstained Because State Criminal Proceedings Had Been Filed and Were Pending at the Time the Three-Judge Court Considered the Case.

The Opinion of the Three-Judge Court (p. 8) stated that it need not abstain from involving itself in this matter as there is no danger of duplicative proceedings or disruption of the state criminal justice system. This finding of the court is belied by the existence of the pending criminal charges.

The court's Opinion relies heavily upon *Steffel v. Thompson,* 415 U.S. ....., 94 S.Ct. 1209 (1974). The United States Supreme Court there specifically set out the focus of its holding in that case as follows:

> The case presents the important question reserved in *Samuels v. Mackell,* whether declaratory relief is precluded when a state prosecution has been threatened but is not pending. . . . (94 S.Ct. 1213) (Citations omitted).

The Federal court interpreted this to mean that the federal court could take jurisdiction if state proceedings had not been filed at the time the federal complaint was filed. The majority of the justices, however, have actually expressed agreement on the fact that the propriety of abstention is to be determined at the time of the *hearing*. The concurring opinion of Mr. Justice Brennan in *Perez v. Ledesma,* 401 U.S. 82, 103, 27 L.Ed.2d 701, 716 (1971), which expresses the views of Mr. Justice White and Mr. Justice Marshall, specifies that:

> The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the *hearing* and not upon the situation when the federal suit was initiated. See *Golden v. Zwickler,* 394 U.S. at 108, 22 L.Ed.2d at 117 (Emphasis added).

The concurring opinion of Mr. Justice Rehnquist (with whom the Chief Justice joined) in *Steffel v. Thompson,* 415 U.S. ....., 94 S.Ct. 1209, 1225-1226, indicates that:

> . . . any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels.*

The limitation imposed on Mr. Justice Rehnquist's views by the concurring opinion of Mr. Justice White are to the effect that:

> . . . a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

Mr. Justice Douglas reiterated the same view in *Allee v. Medrano, supra,* where he states:

> *Younger* and its companion cases are grounded upon the special considerations which apply when a federal court is asked to intervene with pending state criminal prosecutions. *Steffel v. Thompson,* 415 U.S. ..... Although both parties here have assumed the relevance of *Younger,* we have been unable to find any precise indication in the District Court opinion or in the record that there were pending prosecutions *at the time of the District Court decision* (Emphasis added).

From a practical standpoint, appellants submit, the existence of a state criminal complaint cannot be determined as of the time the federal complaint is filed without being confronted by the "duplication of proceedings" which render the granting of declaratory judgment relief improper. Generally, in a case involving the sensitive area of obscenity in which the validity of the search and seizure plays a significant part, a criminal complaint is filed only against the persons who have been subjected to arrest. The pleadings are thereafter amended to include additional parties as the investigation progresses and after a hearing on the issue of obscenity has been had.

In addition, although in the case at hand appellees chose not to serve the federal complaint until January 14, 1974, in the average case a complaint seeking a temporary restraining order, a preliminary injunction, a final injunction, damages *and* a declaratory judgment is *filed and served* at the time the temporary restraining order is requested. The record before the court in this case, in fact, shows that such a complaint was filed (although not *served*) on November 29, 1973. A prompt

hearing on the requested temporary restraining order is mandated by the statute and a prosecutor who is ordered to appear and defend his actions in the Federal Court is obviously reluctant to invest time and effort in the investigation of the case and in the preparation of criminal pleadings the prosecution of which might be enjoined by the federal court. Where a federal complaint is filed, therefore, a criminal complaint against the non-arrested defendants will not often be filed until after the temporary restraining order is denied. When added to the physical impossibility of immediately determining the identity of all the offenders (managers, directors, etc.) the above factors would allow declaratory judgment relief in *all* cases, a result not contemplated by either *Younger* or *Steffel.* Since the three-judge court must be convened to determine whether it has jurisdiction to hear the matter, on the other hand, no judicial effort is wasted by making the availability of declaratory relief dependent on whether state criminal court proceedings are pending at the time the hearing is had and the purposes of comity and federalism are better served.

VII.

The Federal District Court Lacked Jurisdiction Because the Federal Question Presented Lacks Substantiality.

As most aptly pointed out by Stern and Grossman, *Supreme Court Practice,* Sec. 2.14, p. 53:

> The three-judge court procedure is not properly invoked unless the constitutional question raised is "substantial." *Ex-parte Poresky,* 290 U.S. 30; *Flast v. Cohen,* 392 U.S. 83, 91, n. 4. See Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases,* 19

> La. L. Rev. 813 (1959). "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court [United States Supreme Court], as to foreclose the subject." *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255; *Swift & Co. v. Wickham,* 382 U.S. 111, 115; *Zemel v. Rusk,* 381 U.S. 1, 6; *Bell v. Waterfront Commission,* 279 F.2d 853 (C.A. 2).

The record of the *Miranda* case, and Judge Lydick's certification order upon which jurisdiction is bottomed show that the jurisdiction of the three-judge court is based exclusively on that Court's finding that the constitutionality of the California Obscenity Statutes presents a "substantial federal question." This Honorable Court, in *Miller v. California,* .... U.S. ...., 41 L.Ed.2d 1158, dismissed an appeal presenting this identical issue "for want of a substantial federal question."

The dissent written by Mr. Justice Brennan in the *Miller* case recites that:

> Appellant was convicted in Orange County, California, Superior Court of distributing obscene matter in violation of California Penal Code §311.2.
> . . .

After setting forth the text of the California Obscenity Statutes, the dissent goes on to say:

> The Appellate Department of the Superior Court affirmed, and this Court vacated the judgment of that court and remanded the case for reconsideration in light of *Miller v. California,* 413 U.S. 15 (1973), and companion cases. The Appellate Department again affirmed.

In context, the decision, therefore, makes clear that this is a conviction under the California Obscenity Statutes reconsidered and reaffirmed by a California court in light of the *Miller v. California, supra,* requirements of specificity. A dismissal of the appeal "for want of a substantial federal question" under the circumstances is a decision on the merits, determinative of the constitutionality of the California obscenity legislation as interpreted by the California Appellate Courts. This fact is pointed out in *Eaton v. Price,* 360 U.S. 246, 3 L.Ed.2d 1200, 1203 (1959), where the Court concludes:

> Votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.
> . . .

Such a determination on the merits, of course, makes the case controlling as precedent. (See *Eaton v. Price,* 360 U.S. 246, 247, 3 L.Ed.2d 1200, 1202, 79 S.Ct. 978 [opinion of Brennan, J.]; *Ahern v. Murphy* (7th Cir. 1972) 457 F.2d 363, 365; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.,* 71 Cal.2d 1215, 1221, fn. 4 [81 Cal.Rptr. 251, 459 P.2d 667]; Wright, Law of Federal Courts, 495; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review,* 64 Colum.L.Rev. 1, 11) and of value as precedent under the doctrine of *stare decisis. Eaton v. Price, supra; Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra; People v. United National Life Ins. Co.,* 66 Cal.2d 577, 591 [58 Cal.Rptr. 599, 427 P.2d 199]; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 179 F.Supp. 944, 949, fn. 4, revd. on other grounds, 366 U.S. 582, 6 L.Ed.2d 551, 31 S.Ct. 1135.)

As pointed out by *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972), the conclusion of its binding precedent value is inescapable in that where a decision of a state court is based on a criminal state statute, the *only* ground for appellate jurisdiction in the United States Supreme Court is an allegation under 28 U.S.C. §1257(2) that:

> There is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Quite clearly a dismissal for want of a substantial federal question presumes a finding that jurisdiction in the United States Supreme Court exists by virtue of a claim of alleged invalidity and a ruling that the claim of invalidity lacks merit. (The United States Court of Appeals for the Ninth Circuit has so held in *Cross v. Bruning*, 413 F.2d 678 (9th Cir. 1969).)

The Supplemental Opinion seeks to avoid the impact of the above rationale by arguing that denial of certiorari in *Enskat v. California*, ... U.S. ...., 41 L.Ed.2d 1172, indicates that the Supreme Court did not intend to say what it said in *Miller*. The argument fails in light of *J-R Distributors, Inc. v. Washington*, ... U.S. ...., 41 L.Ed.2d 1166, where this Honorable Court denied the Petition for Certiorari and Mr. Justice White quite obviously on behalf of the majority of the court pointed out that:

> In this case and in 13 other cases involving issues dealing with obscenity, Mr. Justice Brennan complains that by denying certiorari or dismissing an appeal, the Court has failed to pass independently on the obscenity of the materials involved. This is a task which he has insisted, see *Jacobellis v. Ohio*, 378 US 184, 187-190, 12 L. Ed.2d 793, 84 S.Ct. 1676 (1964), that the Court must perform under the approach to obscenity which he espoused and explicated for the Court in *Roth v. United States* 354 U.S 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), which he refined for himself and others in *Jacobellis v. Ohio, supra; Memoirs v. Massachusetts*, 383 U.S. 463, 16 L. Ed.2d 1, 86 S.Ct. 975 (1966); *Ginzburg v. United States* 383 U.S. 502, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966); *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966); *Ginzberg v. New York*, 390 U.S. 629, 20 L.Ed. 2d 195, 88 S.Ct. 1274 (1968), but which he has now repudiated.

In response to Justice Brennan's "complaint," Justice White replied:

> Brother Brennan's complaints are wide of the mark. Obscenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity.
>
> . . .
>
> In six other cases, the issue of obscenity vel non is among the questions presented here, but the materials themselves have not been filed with this Court.

The six cases to which the Justice refers are set forth at note two and include *Enskat v. State of California*. In each of those cases (which include *Enskat* but not *Miller*) Justice White goes on to say:

> . . . either the Court of Appeals or the state appellate court expressly addressed the issue of obscenity and found the materials obscene under proper standards. Under these circumstances, denying certiorari is wholly consistent with our practice.

If the *Enskat* court found the materials obscene "under proper standards," *how* can the standard there used be unconstitutional? And if the standards there used are proper, how can the complaint be said to present a substantial federal question?

VIII.

Appointment of Three New Judges and Removal of the Certifying Judge From the Three-Judge Panel Rendered the Three-Judge Court Nonstatutory and Deprived It of Jurisdiction.

The record shows that the case had originally been assigned to Judge Ferguson who disqualified himself (A. p. 20, R. p. 77). The request for injunction was subsequently submitted to Judge Lydick who, on the affidavits before him, found that an injunction under the Civil Rights Act would have been improper *because* the Plaintiff had failed to make any showing whatever that Appellants had acted in bad faith (A. p. 57, R. pp. 182-185). Judge Lydick, however, did determine that a three-judge court should be impaneled to decide the constitutionality of the state statute and duly certified the case. The Chief Judge of the Circuit impaneled *three* judges: William G. East, Warren J. Ferguson and Walter Ely (A. p. 84). Since the court was not duly constituted under 28 U.S.C. §2284, it did not have jurisdiction to hear the matter and to grant injunctive relief. 28 U.S.C. §2284 specified:

> In an action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, *who shall designate two other judges,* at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

The statutory requirement that the judge to "whom the application for injunction or other relief" *shall* constitute one member of such court is integral to the very purpose of the statute since *that* particular judge is the one who makes the preliminary factual determination that a three-judge court is needed. He is also the judge to whom the case is remanded once the purpose for which the three-judge court was convened has been concluded (See *e.g., Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1971); see also *Public Service Commission v. Brashear Freight Lines, Inc.,* 312 U.S. 621, 85 L.Ed. 1083 (1941)). His decisions on most issues of fact will be and are upheld on appeal unless patently erroneous. In a case such as the one at hand, for example, failure to include the judge who called for the convening of the three-judge court resulted in a denial of constitutional as well as procedural due process. Judge Lydick's opinion absolved Appellants of any wrongdoing. The three-judge court, based on the *same* evidence which was before Judge Lydick, made a

finding that the "uncontroverted facts" show harassment. Since a claim for damages which had originally been filed was dismissed without prejudice (R. pp. 4, 22), the finding of harassment places Appellants in the unenviable position of having had the key issue in a damage suit conclusively determined against them without a hearing on the merits.

Moreover, were this Honorable Court to find that the three-judge court was not properly convened, if Judge Lydick were a member of the panel, the case would be remanded to him and his finding as to the issue of harassment would remain viable. Under the present setup, upon dissolution of the three-judge panel, which judge would it be remanded to? Appellants contend that they have the right to have the case *heard* by the judge to whom the case was originally assigned. As Judge Aldrich so aptly stated in *Merced Rosa v. Herrero* (C.A. 1, 1970) 423 F.2d 591, 593 at note 2:

> The writer of the present opinion, speaking as one charged with this duty, believes that the argument of interrelation of the two sections of the statute which Chief Judge Biggs found to give judicial discretion to the district judge, cannot be applied to the provision relating to the chief judge, and that once the request has been formally made, the chief judge's duty is solely ministerial. There is reason for this. *It is the district judge's case*, 28 U.S.C. §2284(1). . . . (Emphasis added).

Additionally, Judge Lydick's original determination of the issue in Appellants' favor lulled Appellants into a false sense of security and, assuming but not granting a final determination of the issue to have been properly ordered submitted upon affidavits, it caused Appellants to believe no additional affidavits were needed since,

as the decision itself admits, the acts of "harassment" consisted of seizures carried out under authority of search warrants issued by a state judge who, on at least two occasions, was present at the seizure.

The statute provides that *only* a court composed as mandated by the statute can hear and determine the matter. The word "shall" is mandatory and a court of three judges which does not include the judge who first heard the matter is not a court composed under the statute and is thus not a court of jurisdiction.

IX.

Legal Actions Performed Under Validly Issued Orders of the State Court Cannot Be Termed Harassment and in the Absence of Harassment the Court's Abstention Was Mandated.

Under the rules set forth in *Perez v. Ledesma, supra,* federal intervention either by way of injunction or by way of declaratory relief should issue:

> Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown. . . .

In the case at hand, the record shows that four films were seized because they were different one from the other (A. pp. 39-41, R. pp. 71-76). Each was seized pursuant to a search warrant and the determination of the existence of substantial differences was made in at least one of the three instances in question by the magistrate prior to the issuance of the search warrant (A. p. 36, R. pp. 71-72). The existence of such differences is further supported by the affidavits which show that Appellees themselves admitted to the

existence of more than one version (A. p. 48, R. pp. 234-238).

The seizures occurred on November 23 and 24. On November 26, an order to show cause was served on the Appellees ordering them to appear in the State Superior Court for an adversary hearing on the issue of obscenity, (A. p. 64, R. pp. 12-16). Appellees alleged that "bad faith" in this case was further evidenced by the fact that Appellants obtained an *ex parte* temporary restraining order against the showing of the film (A. p. 65). Although it is true that such an order was obtained as part of the order to show cause, this Honorable Court should consider the strong protective limitations contained within the order as well as the purpose of the order. The first limitation in the order is a time factor. The order asked Appellees not to show the movie until after a judicial *determination* was held in an *adversary* hearing and provided that the adversary hearing should be had within five days or at any prior time at Appellees' request upon *one hour's* notice to Appellants (A. p. 65, R. pp. 17-18). Appellees did *in fact* request a hearing on the *same* day the order was issued and were in fact given a hearing on that *same date* (A. p. 22, R. pp. 12-16). Certainly neither the Orange County Superior Court nor Appellants can be blamed because Appellees, after requesting a hearing, declared themselves to be *beyond* the jurisdiction of the State court and though "not meaning any disrespect" refused to argue the merits of the obscenity issue.

The District Court found that the "objective facts" described in the opinion:

> . . . clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie "Deep Throat" out of Buena Park.

Appellants submit that four seizures under valid search warrants during a two-day period and followed by an adversary hearing are not "harassment" and "bad faith" within the clear meaning of *Younger v. Harris, supra,* and *Perez v. Ledesma, supra.* See also *Com. of Pa. ex rel. Feiling v. Sincavage,* 439 F.2d 1133 (3d Cir. 1971); *Robbins v. Bryant,* 349 F.Supp. 94, affirmed 474 F.2d 1342; *Boyd v. Hoffman,* 342 F.Supp. 787; *Summers v. McNamara,* 239 F.Supp. 806; *Wilhem v. Turner,* 298 F.Supp. 1335, affirmed 431 F.2d 177, *cert. den.* 401 U.S. 947, 28 L.Ed.2d 230; *Fowler v. Alexander,* 340 F.Supp. 168, affirmed 478 F.2d 694; *Link v. Greyhound Corp.,* 288 F.Supp. 898; *Quinnette v. Garland,* 277 F.Supp. 999; *Haigh v. Snidow,* 231 F. Supp. 324; *Rhodes v. Huston,* 202 F.Supp. 624, affirmed 309 F.2d 959, *cert. den.* 383 U.S. 971, 16 L. Ed.2d 311.

The proposition that an official cannot be guilty of harassment when he legally performs his legal duty is obviously unquestionable, just as it is unquestionable that if the seizures were legal they cannot constitute harassment. Moreover, if a prosecutor honestly believes the law to be as he enforces it, and if his position is rational, he cannot be guilty of harassment.

The jurisdiction of the state court to hold prior adversary hearings under authority of Penal Code Sec-

tions 1526-1540 is not in question. Those statutes have always been interpreted as requiring the magistrate to make an immediate determination of the issue of obscenity at an adversary hearing. (*Cf. Zeitlin v. Arnebergh,* 59 Cal.2d 901; *Aday v. Superior Court,* 55 Cal.2d 789; *Aday v. Municipal Court,* 210 Cal.App. 2d 229; *People v. Superior Court (Loar),* 28 Cal.App. 3d 600.) Under the requirements set forth by this Honorable Court, an adversary hearing and a prompt final judicial determination of the issue of obscenity must be had *before* a seizure of all available copies pending trial can be ordered.

Within the purview of the California search and seizure statutes in compliance with the mandated First Amendment requirements, California magistrates can, upon affidavits supporting probable cause, issue a search warrant for the seizure of *one* copy of a film (Penal Code §1525). Under authority of Penal Code Sections 1540 and 1536, the courts are under a duty to ascertain whether the material is in fact contraband (*i.e.,* obscene) and to order the same returned forthwith if they find it to be not obscene. They can thus order the parties to appear before the court to determine that issue. If after a hearing the court finds the material to be obscene, the prior judicial determination requirement is satisfied and a warrant can issue for the seizure of all copies.

The reviewability and concomitant finality of the court's determination is shown by such cases as *Aday v. Superior Court, supra,* which hold that a Petition for Writ of Prohibition and a Petition for Hearing can be taken from such determination.

Plaintiffs have contended (and the three-judge court has apparently so held in light of their August 3, 1974,

order to show cause *in re* contempt) that a *final judicial* determination of obscenity must be made at the trial and that only one copy can be seized prior to that time. The argument, Appellants contend, flies in the face of logic, common sense, *Aday v. Superior Court, supra,* and *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789. A defendant can avoid multiple seizures and prosecutions by *refraining* from showing a movie held to be obscene after an adversary proceeding until the jury trial has been had, a period of not more than 40 days under California law unless at defendant's request. To hold otherwise is to say that a *judicial* determination is a meaningless act which allows the defendant to keep on committing that which the courts have determined to be a crime and which is, therefore, presumptively a crime.

Moreover, the clear meaning of the cases requires a *judicial,* not a jury determination. *Heller, supra,* as well as all of its precursors, do not speak of a *jury* determination but a *judicial* determination of the issue of obscenity. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), this Honorable Court expressly rejected the concept of a binding jury determination on the issue of obscenity. In that case the Court held that the *judges* have the *duty* to protect free expression by making an independent constitutional determination of obscenity of the materials before it and stated:

> Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

At note 3 of that same opinion, the United States Supreme Court concluded:

> It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standard for obscenity. If freedom is to be preserved, *neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression.*

In compliance with the United States Supreme Court mandates, the California Supreme Court, in *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909, held that the *court* in each case *must* make an independent determination of the obscenity of the material and concluded:

> . . . we believe that this issue must be resolved by this court; it cannot properly be reposed in a jury for final disposition as a question of fact. The crux of our case is whether the definition of obscene matter in Penal Code section 311 sanctions prosecution of sellers of "Tropic of Cancer" and whether the constitutional guarantees of freedom of speech and freedom of the press (U.S. Const., 1st and 14th Amends.; Cal. Const., art. I, §9) permit such prosecution. As we shall point out in more detail, the courts have long recognized that such questions of statutory and constitutional construction and application call for court decisions; they raise issues, not of the ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; the court itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene.

The rationale of the California Court is best expressed in its statement that:

> The determination of what is obscene in the statutory or constitutional sense is not a question of fact (i.e., a question of what happened), but rather is a question of fact mixed with a determination of law; a "constitutional fact."

Aday v. Superior Court, 55 Cal.2d 789; *Aday v. Municipal Court,* 210 Cal.App.2d 229; and *People v. Superior Court,* 28 Cal.App.2d 600, show that a *judicial* determination of the issue of obscenity is to be had at a special hearing as soon as possible after seizure.

Allowing the jury to be the "definitive determinant" of the obscenity of the material is also contrary to presently articulated principles of law. As *Miller v. California, supra,* at note 9 recognizes:

> The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States, supra,* 354 U.S., at 492, n. 30 (1957), "[I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States,* 165 U.S. 486, 499-500."

Zeitlin v. Arnebergh, 59 Cal.2d 901, 907, points to the inconclusiveness of a jury verdict and states:

> A finding of guilt of one purveyor of obscene publications will not necessarily discourage others; indeed such vendors characteristically operate undercover and are inclined to recidivism. If, on the other hand, a verdict expresses a determination that the material is not obscene the city attorney is still free to prosecute another bookseller for selling the same publication. If a criminal verdict, whether of guilt or of innocence, operates primarily within a particular county to ban the book in the case of guilt, or to encourage its sale in the case of innocence, an opposite result might readily obtain in another county. Such an approach must inevitably engender a hodgepodge pattern of suppression and sale.

That same principle was recognized in *Bernard v. Municipal Court*, 142 Cal.App.2d 324, where the court, after a jury acquittal, refused to return the materials because they were obscene.

United States v. West Coast News Co., 228 F.Supp. 171, affirmed 357 F.2d 855 (6th Cir. 1966), reversed on other grounds, 388 U.S. 447, 18 L.Ed.2d 1309 (1967) also supports Appellants' contention. In that case defendant had been priorly tried and acquitted of a similar charge. After noting that the book had not been presented to the jury in the prior case, the court concluded that *even* if the book had been pesented and *even* if the jury had acquitted him, neither double jeopardy nor *res judicata* were applicable because:

> . . . defendant Aday was not charged with the same offense in the District Court in California as that with which he is charged in this case. Besides

> the fact that the book, *The Black Night*, was never submitted to the jury, the indictment in that case charged transportation of that book to different places on different dates than the indictment in this case. See 18 U.S.C. §3237(a).
>
> If the book had been submitted to the jury, and if the jury had acquitted defendant Aday on the count naming the book, *The Black Night, it would still be impossible to know whether or not the jury based its acquittal upon the fact of non-obscenity. It is as reasonable to assume that they may have acquitted defendant Aday on grounds of lack of scienter, or non-transportation* (Emphasis added).

That same court also points out that *each* act of mailing is a separately prosecutable offense and that:

> In fact, the statutes involved in this case contemplate that a defendant may be acquitted for sending a book to one place, and found guilty for sending the same book to another place. Footnote 30 to the majority's opinion in the *Roth* case, *supra*, stated:
>
> "It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States*, 165 U.S. 486, 499-500 [17 S.Ct. 375, 379-380, 41 L.Ed. 799]."

In *State v. Ell-Gee, Inc.*, 255 So.2d 542, for example, the Florida Court of Appeals held against Defendants who had made the following contention:

> Essentially, appellees' reliance is upon its argument that the performance of a play, even though in violation of the several lewdness and obscenity statutes and ordinances, is a continuing performance throughout its run and therefore constitutes but a single episode or transaction within the meaning of *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970), and consequently the conviction in the Municipal Court of Miami Beach foreclosed any prosecution for an earlier performance of the same play, under the Double Jeopardy Clause, of the Fifth Amendment, or under the Doctrine of Collateral Estoppel.

The Court, in rejecting Defendants' double jeopardy claim and in reversing the finding of the Court below, concluded:

> Each performance of the play constituted a separate incident, transaction or episode even though the same words were spoken and the same exposure indulged in. We equate this activity with that of a bookmaker taking separate bets on separate days on any gambling activity, or a prostitute plying her activities day after day, or separate acts of incest committed with the same victim on separate days, or the uttering of a continuous series of forgeries on the same person's account in the same bank, or the shooting of a number of persons with the same gun during a single demonstration or uprising.
>
> Here, each performance of the play presumably was before a different audience, so that the lewd and lascivious conduct or obscenity was portrayed at different times before different persons. The fact that the same words were used and the same lascivious conduct was indulged in does not convert the separate activities into a continuous transaction or continuing activity.

Steffel v. Thompson, Younger v. Harris, and *Perez v. Ledesma* make clear that harassment equals "prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." Where, as in the case at hand, the procedures adopted have been found to be constitutional; where, as here, the law, though unsettled, argues in favor of the legality of Appellants' acts and in favor of the success of the prosecutions, several copies seized, each under a separate search warrant, cannot in and of themselves constitute harassment. Even before the July 25, 1974, *Miller v. California* decision by the Court, the allegation of harassment was improper and fictitious. After July 25, 1974, such an allegation (which must perforce imply a belief on the part of the prosecution that the California obscenity law is invalid) was wholly untenable. Absent proven harassment, the three-judge court abused its discretion in the exercise of jurisdiction and in granting any and all types of injunction or other relief.

X.

Interference With the State Criminal Proceedings Was Apparent and Unavoidable and Abstention Was Mandated.

The very principle upon which *Steffel, supra,* rest[s] the propriety of issuance of a declaratory judgment in the instances therein contemplated, is the recognition that a declaratory judgment is "less abrasive" than an injunctive remedy and will have a "less intrusive effect

on the administration of state criminal laws." The magnitude of the "intrusion" and its "abrasiveness" in the case at hand is readily apparent.

The three-judge court in taking *and maintaining* jurisdiction over the action and in issuing an injunction against further seizures of other movies has provided the defendants in state criminal proceedings with a ready-made scheme to bypass and literally thumb their noses at the state courts. Evidence in the custody of the state court and which is the basis of the criminal proceedings is ordered returned. Although the defendants appear and answer to the state criminal charges they do so knowing that evidence of those charges will be gone at the time of trial. Although the defendants *demand* an adversary hearing prior to a seizure of additional copies, when the state court attempts to give them a hearing, they decline to appear, or if they do appear, they do so to tell the state court that they will not bother to argue the merits because the state court "lacks jurisdiction." (A. p. 72, R. p. 310).

The duplications and contradictions involved are further evidenced by the direct conflict between the orders issued by the state courts and the order of the Federal court. The Superior Court judge held an adversary hearing and found the movies to be obscene (A. p. 74). The seizures were held to be constitutional by a Federal judge (Judge Lydick) (A. p. 57, R. pp. 182-185). The Federal Plaintiff as defendant in the state criminal action moved to suppress as evidence and for the return of those same movies in the Orange County Municipal Court (A. p. 75). The Orange County Municipal Court held two of the seizures invalid. An appeal from that order of the Municipal Court was duly filed and the appeal was pending before the

state appellate court when the order of the three-judge court issued declaring the seizures to be "harassment" and ordering the movies returned. The Appellate Department of the Superior Court in due course issued an order in the criminal proceedings telling the municipal judge who holds the evidence and *who is subject to that order* that he cannot return the films because they are properly seized and are contraband (A. p. 131). The Orange County Superior Court orders an adversary hearing. Defendants walk out stating that the court lacks jurisdiction. After the hearing the Superior Court orders the seizure of all copies. The Federal court retaliates by threatening to hold the District Attorney and the Chief of Police in contempt and by countermanding the order of the Orange County Superior Court. Disruption of state proceedings!?!

In passim, it should be noted that the *one* truly important legal issue for determination in the state cases is whether after an adversary hearing a state court can order the seizure of additional copies of the film. A secondary but just as important legal question relates to the interpretation of California Penal Code Sections 1524-1540 as they relate to the holding of adversary hearings. Had the three-judge court refused to interfere, the Federal Plaintiffs would have litigated those issues where the issues belonged—in the state court proceedings. Instead they decided to ignore the fact that the order of seizure after adversary hearing is a *search warrant* and that the taking of evidence by the issuing magistrate is specifically provided for in California Penal Code Section 1526. They have conveniently blinded themselves to the fact that *each search warrant* is severely limited in scope and duration by those sections of the Penal Code and have op-

tioned (understandably on their part) to argue "harassment" before a three-judge court which ends up as a court with apparent appellate jurisdiction over the Appellate Courts of the State of California.

By allowing the Petitioners to argue the matter in the Federal Courts after their refusal to submit to the jurisdiction of the State Courts and to pursue their appellate remedy as to the jurisdictional issue prior to intervening, the Federal Court *presumed* and *assumed* inability on the part of all levels of State Courts to do justice. Since Petitioners' original argument centered on the validity of State Statutes regulating searches and seizures, the action of the Federal Court had the further effect of obstructing the proper administration of justice by precluding an authoritative determination of the issue—a key issue in this case—by the California Appellate Court. Nor is federal intervention excused by need for speed since the California Appellate Court, Fourth Appellate District, has been consistent in its granting of *immediate* stays pending consideration of the merits of any issue of First Amendment importance. (Had the Federal Court taken evidence in this case, the testimony of the Court Clerk would have shown this to be true.) Appellants respectfully submit that the old and well-established concepts of comity strongly argue gross abuse of discretion on the part of the Federal Court in deciding to intervene under the circumstances of this case, an abuse that can only tend to encourage future similar actions and thus can only tend to encourage disrespect for the authority of a sister court —and for all courts—and lead to the very abuses decried by *Steffanelli v. Minard,* 342 U.S. 117, 123-124 (1951), and *Veen v. Davis,* 326 F.Supp. 116, 117 (C.D. Cal. 1971).

XI.

The Record Shows Lack of Jurisdiction in That the Complaint Seeks Recovery of Property in the Custody of a State Court of Prior Jurisdiction and Federal Intervention Is Prohibited in Such Cases.

In *Donovan v. Dallas,* 377 U.S. 408, 411, 12 L.Ed. 2d 409, 413 (1964), the Supreme Court points out that when the aim of the proceedings is property in the custody of a state court the proceedings are *in rem* or *quasi rem* proceedings. In such cases, the jurisdiction with the Court having custody is *exclusive:*

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule had continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson,* 305 U.S. 456, 456-468, 83 L.Ed. 285, 290-292, 59 S.Ct. 275.

Moreover, even where the state court and the federal court have concurrent jurisdiction, the first court issuing its decision does not and *cannot* enforce the judgment it renders by contempt or injunction. Rather, the opinion states the proper method of procedure to be as follows:

> In *Princess Lida* this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of

them which may be set up as res judicata in the other." *Id.*, at 466, 83 L.Ed. at 291. See also *Kline v. Burke Construction Co.*, 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.

To the same effect are *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 86 L.Ed. 100 (1941); *Purcell v. Summers*, 126 F.2d 390 (4th Cir. 1941), *cert. den.* 317 U.S. 640, 87 L.Ed. 516. See also *Phillips v. City of Atlanta*, 57 F.Supp. 588; *Downing v. Davis*, 34 F.Supp. 872; *White v. Crow*, 17 Fed. 98, affirmed 110 U.S. 183, 28 L.Ed. 113 (1884).

In the case at hand, since all of the property to which the June 4 order to return and the September 30, 1974 order to petition are directed as well as the property sought to be returned *is* in the custody of the state court and is evidence in criminal proceedings, both of the Federal court orders are jurisdictionally defective.

XII.

California Penal Code Section 311.2 as Construed by Enskat, Supra, and by Prior California Decisions Is Constitutionally Valid Under the Test Set Forth in Miller v. California.

This Honorable Court in *Miller v. California* set forth the following guidelines to be used in determining the validity of a State Statute:

> (a) Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. *Kois v. Wisconsin, supra,* 408 U.S. at 230 (1972), quoting *Roth v. United States, supra,* 354 U.S. at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

> applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The first prong or part (a) of the test is identical to the requirement set forth in the California statute. The third prong or part (c) of the test is obviously satisfied by the "utterly without redeeming social importance" California test which *Miller* recognized to be more "burdensome" on the prosecution than the test adopted in *Miller*. These two prongs of the three-pronged *Miller* definition cannot, therefore, be said to be either "vague" or unconstitutional and require no discussion.

The sole question for determination, therefore, is whether the California Statutes as construed satisfy part (b) of the *Miller* test. The *Miller* opinion gives the following examples of what constitutes a valid definition:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

The definition, however, is the constitutional limitation set on the states, but as with all constitutional limitations, a state statute *need not* prohibit all that the Constitution allows. And, as pointed out by the opinion, a state statute will not be declared unconstitutionally vague, if it has been "constitutionally" construed. As further stated in the opinion:

> *Under the holdings announced today, no one will be subject to prosecution for the sale or exposure*

of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed (Emphasis added).

Interestingly, the word "hard core" appears over and over in the opinion. For example, Justice Burger concludes part two of the opinion by stating:

But today, for the first time since Roth was decided in 1957, a majority of this court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment (Emphasis added).

This same statement is reiterated in part IV where the Justice concludes:

. . . it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine (Emphasis added).

In passim, it should of course be noted that the opinion finds the *Miller* trial to have been constitutionally conducted, the material in *Miller* to have been constitutionally unprotected because obscene, and the conviction to be free from constitutional infirmity.

An analysis of some of the California Appellate cases from 1963 to date shows that the California statute has, at least in the last ten years, been interpreted to prohibit the possession for sale and distribution of "hard core" pornography which is defined by those same cases as *patently offensive depiction or description of ultimate sexual acts such as intercourse, bestiality, sodomy and oral copulation, etc.* (Since these are the only acts involved in California prosecutions under the present statute, a more exact definition is not necessary. For those who might be in doubt as to the meaning of the word "ultimate", it seems rather obvious that the word implies and describes those acts which lead to a culmination, that is to orgasm.)

In 1963 Justice Tobriner, in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 912 recognized that:

The Legislature patterned its definition of obscenity upon that set forth in the American Law Institute's Model Penal Code (Sec. 207.10), portions of which had been approved as constitutionally permissible standards by the United States Supreme Court in *Roth v. United States* (1957), *supra*, 354 U.S. 476. This decision and others of the United States Supreme Court, we think, impliedly drew a line of constitutional protection around all material except that which had been described as *hard core* pornography (Emphasis added).

That same opinion goes on to say:

Mr. Justice Brennan, *writing the majority opinion*, held that "obscenity is not within the area of constitutionally protected speech or press" (p. 485) because, in the words that were later incorporated in the California statute, obscenity is "utterly without redeeming social importance." (p. 484) *He points out that "sex and obscenity are not synonymous . . .* [and the] *portrayal of sex, e.g. in art, literature and scientific works . . .* [is entitled to] *the constitutional protection of freedom of speech and press*" provided that it

does not become the *designated* kind of obscenity (Emphasis added).

At page 914 of that same opinion, the Court concluded:

I do not think that the federal statute can be constitutionally construed to reach other than what the government has termed as "*hard core*" pornography (Emphasis added).

At pages 194-195, the opinion describes several incidents and sexual acts it considered not to be "obscene" or "hard core" pornography. Thereafter the Justice defines what *is* hard core pornography (*id.* at pp. 919-920) in terms which can only be said to anticipate today's *Miller* test.

In 1967, the California Supreme Court again reaffirmed its definition of "hard core" pornography in *People v. Noroff*, 67 Cal.2d 791, 794. There the Court found the material not to be obscene *because:*

Most of the pictures, however, depict entirely innocuous outdoor activities at a nudist colony or sunbathing camp; none of the photographs displays any form of *sexual activity* (Emphasis added).

At note 26, the footnote which follows the above statement, the Court concludes by spe[illegible] *defining* what depictions and descriptions constitute "hard core" pornography:

The graphic depiction of such sexual activity is the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg v. United States, supra,* 383 U.S. 463, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of "*animating* sensual detail to give the publication a salacious case . . ." (Emphasis added). (*Id.*, at p. 471 [16 L.Ed.2d at p. 38]).

Similarly, in 1968 the Court in *In re Panchot,* 70 Cal.2d 105, 107 stated:

Graphic depiction of sexual activity is the distinguishing feature of the only materials which the United States Supreme Court has ruled to be obscene (Emphasis added).

In *People v. Cimber,* 271 Cal.App.2d Supp. 867, 869 the court reiterated:

To constitute obscenity under the rules established by the United States Supreme Court and the even *more stringent requirements* of our State Supreme Court the material must contain a graphic description of sexual activity. (*In re Panchot* (1968) 70 Cal.2d 105 [73 Cal.Rptr. 689, 448 P.2d 385].) There the pictures contained depictions of masochism, masturbation and simulated sexual intercourse. As these are fields which fall under the highest courts' definition of hard core pornography . . .

In 1971, the court in *People v. Golden,* 20 Cal.App. 3d 211, 214 describes a warrant for the seizure of motion picture films:

Based on these facts, Sergeant Shaidell stated in his affidavit for warrant that he had reasonable and probable cause to believe that in defendant's automobile and at his home there were ". . . *motion picture films depicting acts of sexual intercourse, masturbation, sodomy, bestiality and*

oral copulation; booklets, commonly known to your affiant as 'Tijuana Bibles, which depict in writing and photograph and drawing acts of sexual intercourse, sodomy, masturbation, bestiality and oral copulation.' " (Emphasis added).

In *People v. Stout*, decided in 1971, 8 Cal.App.3d 172, 174, both defendant and prosecution stipulated that the material *was* obscene. The Court, in upholding the stipulation, stated:

> Appellant stipulated in the trial court that the film exhibited by him is "obscene according to the latest expression of the California Supreme Court and the United States Supreme Court." The stipulation is amply supported by the record which shows that the film in question *constituted hard core pornography* (Emphasis added).

The same rationale is followed in *People v. Burnstad*, 32 Cal.App.3d 560, 562. In that case the court in upholding the search warrant did so because:

> Here the *defendant had himself placed the mark of contraband on the films.* In all his dealings with Officer Dixon, defendant had pandered all of his films as "hardcore" pornography (Emphasis added).

The above cases show that (a) California statutes have been interpreted by the California courts to limit prosecution to "hardcore" pornography. (b) "hardcore pornography" is and has been defined by the cases as an explicit and graphic depiction of "ultimate" sexual activity either heterosexual or homosexual, that is, depictions and descriptions of acts of sexual intercourse, masturbation, sodomy, bestiality, sadism, masochism and oral copulation deliberately designed to stimulate sexual feelings (that is, "appeal to the prurient interest.") (c) the meaning of hard core pornography is well known and much used by the defendants themselves in describing the material and is merely a one-word definition for the behavior described in *Miller*, (d) hard core was prosecutable before *Miller* and is certainly prosecutable now.

The last California Appellate Court decision on the issue, *People v. Enskat*, 33 Cal.App.3d 900 reaffirms the definition of obscenity given in the above cases and constitutes a *post-Miller* authoritative interpretation of the obscenity statutes.

Appellants respectfully submit that the above cases argue very strongly in favor of the propriety of the Appellate Court interpretation of the California statute and of its finding that the California obscenity statutes are constitutional.

In light of the construction given to the California Statutes by the California cases, Appellants submit that the California Statute is unquestionably sufficiently clear to withstand constitutional attack. As this Honorable Court has reiterated at note 11 of the *Miller* decision:

> Many decisions have recognized that these terms of obscenity statutes are not precise. (Footnote omitted.) This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. . . . (T)he Constitution does not require impossible standards; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States v. Petrillo*, 332 U.S. 1, 7-8.

Finally, this Honorable Court in *Hamling v. United States,* .... U.S. .... made clear that a construction similar to the construction in *Enskat* is constitutionally proper.

In light of all of the above authorities, the finding of unconstitutionality made by the three-judge court must be reversed.

Conclusion.

For the reasons above stated, it is respectfully submitted that the judgment of the court below should be reversed and the complaint should be ordered dismissed for lack of jurisdiction.

Dated this 31st day of December, 1974.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California, et al.,

Appellants,

vs.

VINCENT MIRANDA, et al.,

Appellees.

On Appeal from the United States District Court for the Central District of California

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Appellees.

On Appeal from the United States District Court for the Central District of California

Appellants' Brief

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Central District of California is set forth in Exhibit A to the Jurisdictional Statement filed herein.

JURISDICTION

On March 20, 1974, Notice of the pendency of the action to the Attorney General of California was filed by the three-judge panel of the United States District Court pursuant to Title 28, United States Code section 2284(2). The judgment of the three-judge panel was filed on June 4, 1974.

Notice of appeal was filed on July 5, 1974. The jurisdiction of the Supreme Court to review the judgment of the court below on direct appeal is conferred by Title 28, United States Code, section 1253.

QUESTIONS PRESENTED

1. Whether California's obscenity statutes, as authoritatively construed by California Appellate Courts, meet the constitutional standards set forth by this Court in *Miller v. California,* 413 U.S. 15 (1973).

2. Whether abstention is compelled where the federal action would have a disruptive effect on a valid ongoing state prosecution.

3. Whether the three-judge court, improperly constituted by failure to follow the procedures mandated by 28 U.S.C. 2284, deprives that court of jurisdiction to proceed and voids subsequent injunctive orders by that court.

STATUTES INVOLVED

California Penal Code sections 311, 311.2 *et seq.,* 312, and California Penal Code sections 1526, 1536 and 1540. (These statutes are set forth in Appendix E of the Jurisdictional Statement on file herein.)

STATEMENT

Appellees are the owners of the Pussycat Theater located at 6177 Beach Boulevard, Buena Park, California. This theater exhibits motion picture films to adults only. Said theater was open and operating during the period from November 23, 1973, to November 29, 1973.

Appellant Cecil Hicks is the District Attorney of Orange County, California, the county in which said theater is located. As such, Hicks is charged with the duty of enforcing the provisions of the California Penal Code in Orange County, California.

On November 23, 1973, the Honorable John H. Smith, Jr., Judge of the Municipal Court, Central Orange County Judicial District, along with several officers from the Buena Park Police Department, viewed a film entitled "Deep Throat" at the Pussycat Theater owned by Appellees in Buena Park, California. Based on his viewing of the film, Judge Smith believed there was probable cause to believe the film to be obscene and issued a search warrant for the seizure of the film (A. p. 36, R. p. 221).

On the same day, November 23, 1973, at about 4:30 p.m., Buena Park police officers made a seizure of another copy of "Deep Throat" which was being shown at Appellee's theater. The seizure was made pursuant to a second search warrant signed by Judge Smith. The affidavit of said warrant stated that the second copy of the film in fact differed from that seen by Judge Smith as there were additional scenes of sexual activities not present in the first film. (A. p. 40, R. 223-227).

Later that day a third seizure of a copy of the film "Deep Throat" was made. This seizure was made pursuant to a warrant signed by Judge Smith who had personally returned to the theater to again view the film. During this viewing, Officer Fontecchio of the Buena Park Police Department sat with the judge and pointed out differences between the copy being viewed and the previously seized copies. Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further to seize all monies present in the theater, including money in the theater safe. Pursuant to the judge's order, the officers called a licensed locksmith who opened the theater's safe from which some $4,000.00 was seized (A. p. 40, R. pp. 223-227).

On Saturday, November 24, 1973, the Buena Park police officers deposited with Judge Smith all items which had

been seized pursuant to the three warrants. Also on that date, the officers observed a fourth copy of the film "Deep Throat" which was being shown at appellees' theater. The officers saw the film and noted that this fourth film was different from the seized copies. They reported the differences to Judge Smith who issued yet another search warrant, and a fourth seizure of the film was effected (A. p. 41, R. pp. 223-227).

On Monday, November 26, 1973, criminal complaints were filed against appellee's agents who were managing the theater and showing the films alleging violations in four counts of California Penal Code section 311.2 (A. p. 63). Those prosecutions are still pending, and have been continued at appellee's request to allow a final determination of these proceedings (A. p. 67, R. p. 285).

Additionally, on November 26, 1973, in the Orange County Superior Court, the People of the State of California applied for and were granted a temporary restraining order and order to show cause in respect to a determination of obscenity of the film "Deep Throat". In the order to show cause the Superior Court ordered appellees to appear and show cause five days later why all copies of the film "Deep Throat" in their possession in Orange County should not be ordered seized as being obscene. The order further provided that the hearing on the issue of obscenity could be had at the request of appellees at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice. On appellee's request, at 2:30 p.m. on that same day such hearing was held in the Orange County Superior Court, the Honorable Byron K. McMillan, the judge who had issued the order to show cause and temporary restraining order, presiding (A. pp. 22, 64-65).

Counsel for appellees appeared at that hearing and argued that the Orange County Superior Court lacked jurisdiction to conduct such a hearing (A. p. 68, R. p. 283). He filed with the Superior Court a short document entitled "Reservation of Federal Constitutional Question", in which he stated: "Defendants . . . reserve all federal constitutional claims for purposes of federal jurisdiction." (A. p. 75, R. p. 26). When the Superior Court ruled that jurisdiction was present, counsel for appellees refused to submit to the jurisdiction of the state court. The matter was then recessed until the following morning at 9:00 a.m. for the taking of evidence, and counsel for appellees was advised that if appellees failed to make an appearance the hearing would be held in their absence.

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence, the court ruled that the film "Deep Throat" was obscene beyond any reasonable doubt. The court then issued an "Order of Seizure After Adversary Hearing" by which officers were directed to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theater or which were to be found there in the future, and to bring the same before the court. This order was served upon the theater that day. No seizure was made, however, as no copies of the film were present (A. p. 74, R. pp. 324-325).

On November 29, 1973, appellees filed a complaint in the United States District Court for the Central District of California by which they sought damages together with declaratory and injunctive relief (A. p. 10). The case was assigned to Judge Warren J. Ferguson who disqualied himself, giving as his reasons the fact that he was the attorney who incorporated the City of Buena Park and had served

as the City Attorney of Buena Park from 1953 until 1959 (A. p. 20, R. p. 11).

On December 28, 1973, an order denying a temporary restraining order was issued by United States District Judge Lawrence T. Lydick. The order reflects Judge Lydick's finding that the record is totally devoid of any showing of wrongdoing by appellants:

> "The record before us shows that on November 23 and 24, 1973, law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film 'Deep Throat' as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.
>
> Thereafter on November 26, 1973, defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973, at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff's corporation's theater seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendant and the State courts.
>
> In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required." (A. p. 57, R. pp. 182-185).

Judge Lydick determined, however, that other issues presented by appellees' complaint required the empanelment of a three-judge court:

> "The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. Section 2281. Having determined that the constitutional question raised is not, legally speaking, non-existent, that the complaint at least formally alleges (C.T. p. 184) a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification and certification in accordance with 28 U.S.C. Sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause." (A. pp. 57-58).

On January 8, 1974, an order designating the Honorables Ely, Ferguson and East as the three-judge court to hear the case was entered by Judge Chambers, Chief Judge for

the Ninth Circuit (This order was forwarded to appellants on February 8, 1974.) (A. pp. 82-85, R. 341-342).

Also on January 8, 1974, Mr. Bayley, manager of appellee's theater and a defendant in the state court prosecution, filed a motion to suppress as illegally seized the four copies of "Deep Throat" (A. p. 80, R. pp. 365-367). On January 15, 1974, the state criminal complaint was amended to include appellees (A. p. 92, R. p. 574).

On January 29, 1974, appellants filed an answer in the action pending in the United States District Court. The answer was supported by certified documents and declarations signed under penalty of perjury (essentially the same documents and affidavits presented to Judge Lydick in opposition to the temporary restraining order) (A. p. 87). On that same day the Orange County Municipal Court granted appellees' motion to suppress as to two of the copies of "Deep Throat". The motion was denied as to the other two copies. On February 15, 1974, appellants filed notice of appeal from the Orange County Municipal Court's order of suppression (A. p. 87, R. pp. 404-405).

On February 7, 1974, appellees filed motion to dismiss claim of damages without prejudice and submitted an affidavit in support thereof. At that same time, appellants moved for summary judgment. On March 4, 1974, District Court Judge Ferguson granted appellees' motion to dismiss, but denied appellants' motion as "moot".

On March 20, 1974, a memorandum was issued by Judge Ferguson on behalf of the three-judge court ordering the issue of harassment submitted on affidavits and requesting additional points and authorities on the issue of the constitutionality of the state statutes (A. p 89, R. pp. 427-428). Neither appellees nor appellants submitted additional affidavits. Thus, the three-judge court had before it only the original affidavits presented to Judge Lydick.

On June 4, 1974, the three-judge court issued its memorandum opinion (Jurisd. Statement A. pp. 1-21). A notice that a motion for relief from judgment to amend and alter judgment and to correct errors in the judgment pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (d), 60(a) and (b), and 62 would be made on July 1 was filed by appellants Gourley, Fontecchio, Hafdahl and Harrison on June 14, 1974 (A. p. 90, R. p. 531). Petitions for Rehearing under Rule 60(b) of the Federal Rules of Civil Procedure were filed by the other appellants. A motion to stay the proceedings was also filed (A. p. 91, R. p. 533A).

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of all the seizures in this criminal action and acknowledged that a valid adversary hearing on the issue of obscenity had been held (A. p. 131).

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Orange County Superior Court that the film "Deep Throat" was still being shown and asked whether the court wished to issue a warrant for its seizure. An adversary hearing having been had on November 26 and 27, 1973, the court issued a search warrant and several seizures occurred between Monday, July 29 and Friday, August 2, 1974, each on a separate warrant, and each being the source of a new prosecution against the theater, employees etc. (A. pp. 106-112). Those prosecutions are presently pending.

In addition, on July 30, 1974, the state court, upon affidavit of a police officer, issued a search warrant for the seizure of the film "Devil in Miss Jones" which was being shown at the same theater in conjunction with "Deep Throat" (A. pp. 108-109). On July 31, 1974, a second search warrant was issued and a second copy seized (A. p. 110).

This search warrant was issued in conjunction with an order to show cause by which appellees were directed to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at appellees' request, and show cause why all copies in possession of the theater should not be seized. The warrant further provided that if appellees had no additional copies available for showing, the second copy would be returned pending the August 2, 1974, hearing. As to each seizure, state criminal complaints have been filed and are pending (A. p. 118).

On Saturday, August 3, 1974, the Federal Court issued an order to show cause *in re* contempt and a temporary restraining order. All defendants in the Federal action were ordered to appear on August 12, 1974, and show cause why they should not be found in contempt of the order to return issued on the declaratory judgment of the three-judge court. Seizures of the movies "Deep Throat" and "Devil in Miss Jones" were temporarily restrained as violative of the June 4, 1974, order and appellants were further ordered to show cause why future seizures and prosecutions should not be prohibited and all items seized ordered returned (Jurisd. Statement E). In all other respects appellees' request was denied.

On August 12, 1974, Judge Ferguson heard argument and indicated that the three-judge court was considering whether this Court's dismissal of the appeal in *Miller v. California,* for "want of a substantial question" on July 26, 1974, required reversal of the three-judge court's opinion. Judge Ferguson indicated that the issue was a "different one", and that he did not know when an opinion by that court would be forthcoming.

On August 22, 1974, a notice of direct appeal to the United States Supreme Court pursuant to 28 U.S.C. section 1253 having been duly filed, the appropriate filing fees having been paid, the record on appeal having been certified and the jurisdictional statement having been served, the appeal was docketed with the United States Supreme Court.

On September 30, 1974, the three-judge court issued its supplemental opinion and its purported amended judgment in which the court reiterated its finding that the California obscenity statutes are unconstitutional on the theory that the dismissal "for want of a substantial federal question" of the appeal in *Miller v. California,* ..... U.S. ....., 41 L.Ed.2d 1158 by this Court is not a decision on the merits of binding precedential effect (A. p. 121).

The three-judge court, in that opinion, modified the judgment as follows:

> At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated."
>
> It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.
>
> Paragraph *two* of the judgment of this court will be amended to read as follows:
>
> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park.
>
> Except as the judgment will be so modified, the motions of the defendants are denied.

SUMMARY OF ARGUMENT

1. The district court erred in determining that California's obscenity statutes are unconstitutionally vague under the test set forth by this Court in *Miller v. California,* 413 U.S. 15 (1973). As authoritatively construed by California appellate decisions those statutes specifically define the proscribed conduct within the guidelines set forth by this Court by defining obscene material as material depicting or describing explicit acts of masturbation, oral copulation, sadism, masochism and graphic depiction of sexual activity as constituting "hard-core" pornography.

2. Abstention is compelled where intervention by the Federal court would have a disruptive effect on an ongoing state prosecution in which the federal plaintiff has the opportunity to vindicate the Constitutional claims which are the subject of his request for federal injunctive or declaratory relief. There was such an ongoing state prosecution in this case as appellees had been named defendants in an action by which state officials sought an order for seizure of all copies of the film "Deep Throat", due to an identity of interest between appellees and their agents and employees who were defendants in a state criminal prosecution, the subject of which was appellees' obscene films which were subject to destruction pursuant to California Penal Code section 312, and because, by the time abstention was considered by the three-judge court, the state criminal complaint had been amended to include appellees. Moreover, the three-judge court erred in finding harassment by state authorities in this case.

3. Because the three-judge court was improperly convened and improperly constituted under Title 28, United States Code, section 2284, that court lacked jurisdiction to proceed in the matter and its subsequent injunctive orders must be deemed void.

ARGUMENT

I. California's Obscenity Statutes, as Authoritatively Construed by California Appellate Courts, Are Constitutionally Valid Under the Test Set Forth in Miller v. California.

By a memorandum opinion filed June 4, 1974, the three-judge District Court held California Penal Code sections 311 and 311.2 *et seq.* unconstitutionally vague under the test set forth by this Court in *Miller v. California,* 413 U.S. 15 (1973). The District Court stated:

> "In summary, we find (1) the California obscenity statute as written does not meet the specificity test of *Miller* and (2) the California courts, in interpreting the statute may have liberalized it beyond its wording but have not specifically construed it so as to give fair notice as to what is constitutionally prohibited."

Adopting this conclusion, the three-judge panel specifically rejected the prior holding of the California Court of Appeal in the post-*Miller* decision of *People v. Enskat,* 33 Cal. App.3d 900, 109 Cal.Rptr. 433 (1973). In *Enskat,* the California court determined that the California statutes, as construed, meet the test of *Miller.*

We submit that the three-judge court erred in this finding, and that the California obscenity statutes, as authoritatively construed by California courts, are sufficiently specific in defining the prohibited conduct.

A.

In *Miller,* this Court established new guidelines for the regulation of obscenity by the state and federal governments. Significantly, however, this Court did *not* invalidate the California statutes involved in *Miller,* but, rather, remanded the matter to state courts for reinterpretation of these statutes in light of the new definitions of obscenity

set forth in that opinion. In so doing, this Court stated that valid obscenity regulations must specifically define the conduct proscribed "by the applicable state law as written *or authoritatively construed.*" *Miller v. California, supra,* at p. 24. Indeed, this passage is followed by a footnote which states: "We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereinafter, may well be adequate. *Miller v. California, supra,* 413 U.S., at p. 24, fn. 6.

To the same effect, this Court stated in *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973):

> "In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in the Paris Adult Theater I or II provided that the applicable Georgia law, as written *or authoritatively interpreted by the Georgia courts,* meets the First Amendment standard set forth in *Miller v. California, supra,* 413 U.S., at 23-25, 37 L.Ed.2d at 431." *Id.* at p. 69.

Speaking on the same subject in the companion case of *United States v. 12 Two Hundred Foot Reels,* 413 U.S. 123 (1973), this Court construed the federal statutes relating to obscenity in accordance with the *Miller* decision noting "while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes. . . ." *Id.* at p. 130, fn. 7.

Thus, this Court continues to recognize the propriety of state courts authoritatively construing their statutes relating to obscenity as well as other First Amendment areas so that those statutes fall within constitutional guidelines. Interpretations of state statutes by state courts have the same effect as amendments to those statutes by the

state Legislature. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 285 (1961). See also *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971); *United States v. Reidel,* 402 U.S. 351, 356-357 (1971); *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 687-688 (1959); *Winters v. New York,* 333 U.S. 507 (1948).

B.

California Penal Code section 311 defines obscene matter as follows:

> "[a] 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i.e.,* a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in the description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Enacted in 1961, and unchanged in its material parts since, Penal Code section 311 is derived from the language of this Court in *Roth v. United States,* 354 U.S. 476 (1956), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1965). In *Miller v. California,* 413 U.S. 15 (1973), however, this Court announced a new definition of obscenity as follows:

> "(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,
>
> (b) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law,
>
> "(c) Whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value." *Id.* at p. 24.

This Court also defined in *Miller* the type of conduct which may be forbidden by state laws under part (b) of the above test as:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at p. 25.

Thus, the *Miller* definition of obscenity differs in only two ways from the *Roth/Memoirs* definition and the definition in the California Penal Code. First, the words "utterly without redeeming social value or importance" have been replaced by the phrase, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Second, part (b), or the poriton of the *Memoirs'* definition which deals with "patently offensive" material, has been replaced by the phrase which sets as the standard, "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law."

The first element of California Penal Code section 311—that the predominate appeal of the matter to the average person, applying contemporary standards, is to the prurient interest—is identical to the first of the three *Miller* requirements set forth above. The question therefore presented is whether the statutes, as written or construed, meet the requirements of parts (b) and (c) of the *Miller* standard.

C.

By requiring that the matter must go "substantially beyond customary limits of candor in description or representation of such matters", California Penal Code section 311 is substantially the same as the *Miller* formulation (b)

set forth above. It is true, of course, that part (b) of the standard set out in *Miller* requires that these matters must be "specifically defined by the applicable state law." We submit, however, that, contrary to the finding by the three-judge panel, previous California cases have authoritatively construed this statute and have so limited it.

In *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963), the California Supreme Court stated:

> "In substance these courts, applying the rulings of the United States Supreme Court, hold that if material is commercial obscenity of saleable pornography it is obscenity in the sense that it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guarantees." *Id.* at p. 918.

Moreover, the court stated:

> "By embracing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was totally devoid of social importance. The only material that falls into the latter category is hard-core pornography." *Id.* at p. 920.

Thus it is plainly recognized in California law that the only material which may be prosecuted as obscene is "hard-core" pornography; that is to say, that material which is "utterly without redeeming social importance."

Moreover, the material must be "designed to stimulate sexual feelings and act as an aphrodisiac." This must be the dominant theme of the matter "taken as a whole." *In re Van Geldern,* 14 Cal.App.3d 838, 843, 92 Cal.Rptr. 592 (1971); *Dixon v. Municipal Court,* 267 Cal.App.2d 789, 73

Cal.Rptr. 587 (1968) [disapproved on other grounds in *People v. Barrows,* 1 Cal.3d 821, 83 Cal.Rptr. 819 (1970).]. Further, it is settled law in California that in order to be regarded obscene, the matter must contain a *graphic description of sexual activity,* and must appeal to a prurient interest in sex. Accordingly, the representation of the nude human form in a nonsexual context does not offend Penal Code section 311 *et seq. People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967) ["nudist magazine" held not obscene]. See also *In re Panchot,* 70 Cal.2d 105, 73 Cal.Rptr. 689 (1968) [photographs depicting nudity held not obscene]; *In re Giannini,* 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968) [nude dancing by live performer held not obscene]; *People v. Rosakos,* 268 Cal.App.2d 497, 74 Cal.Rptr. 34 (1968) [photographs depicting nudity held not obscene].

The purpose of specificity is to afford the potential defendant with notice of that for which he may be held accountable by clarifying the perimeters of the proscribed conduct. We submit, however, that *Miller's* demand for specificity does not require a detailed statutory enumeration and description of *all* of the types of sexual activity sought to be proscribed as obscene. Rather, this Court concluded in *Miller* that obscenity statutes may be upheld, despite "the inability to define regulated materials with ultimate, god-like precision. . . ." *Id.* at p. 28. Such detail is not required under the holding of *Roth v. United States, supra,* 354 U.S., at p. 491.

Although we view it unnecessary that to avert the constitutional infirmity of vagueness the statute must recite a detailed "blueprint" of the proscribed conduct, the conclusion of the three-judge District Court that "The term 'hard core pornography' is no more precise than the term 'obscenity'." must be rejected. In *People v. Noroff, supra,* the California Supreme Court stated:

> "The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg v. United States, supra,* 383 U.S. 463, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of '*animating* sensual detail to give the publication a salacious cast. . . .' (Italics added.) (*Id.,* at p. 471 [16 L.Ed.2d at p. 38].) The materials at issue in *Mishkin v. New York* (1966) 383 U.S. 502 [16 L.Ed.2d 56, 86 S.Ct. 958], portrayed 'sexuality in many guises. Some depict[ed] relatively normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality. Many [had] covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. . . .' (*Id.,* at p. 505 [16 L.Ed.2d at p. 60].) Finally, the film central to the litigation in *Landau v. Fording, supra,* 387 U.S. 456, 'explicitly and vividly revealed acts of masturbation, oral copulation, . . . sadism, masochism and sex' (245 Cal.App.2d 820, 822, affd. *per curiam,* 387 U.S. 456). *Such materials, and no others, have been thought to constitute 'hard core pornography.'* " (Emphasis added). *Id.* at p. 794, n. 6.

Accordingly it is submitted that, as held in *People v. Enskat, supra,* previous decisions of California Appellate Courts have authoritatively construed California obscenity statutes, meeting the specificity requirements of *Miller.*

D.

Finally, as earlier noted, part (c) of the *Miller* formulation abandons the requirement of *Roth* and *Memoirs* that allegedly obscene matter be "*utterly without redeeming social importance*", and in place of that test adopts a requisite that the questioned matter, taken as a whole, "*not*

have serious literary, artistic, political, or scientific value." *Miller v. California, supra*, 413 U.S., at p. 24. This does not, however, compel the conclusion that California Penal Code section 311 *et seq.* is constitutionally defective because it includes the earlier *Roth* language.

Plainly, the states are at liberty to impose more stringent standards for obscenity prosecutions than are constitutionally required. In *Paris Adult Theater I v. Slaton, supra*, this Court stated:

> "It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material." 413 U.S., at pp. 53-54.

As early as *Winters v. New York*, 333 U.S. 507 (1947), this Court recognized that the states have the power to broaden the range of permissible conduct before punishable acts of obscenity are reached. The constitutional concern is only that the state "does not transgress the boundaries fixed by the Constitution for freedom of expression." *Id.* at p. 515. That application of the *Roth* "utterly without redeeming social importance" standard is constitutionally inoffensive was recognized by this Court in *Hamling v. United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974):

> "Petitioners' final Miller-based contention is that our rejection of the third part of the Memoirs test and our revision of that test in Miller indicates that 17 USC § 1461 [18 USCS § 1461] was at the time of their conviction unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of 'social value.' But our opinion in Miller plainly indicates that we rejected the Memoirs 'social value' formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from

> the definition of obscenity in Roth, and because in calling on the prosecution to 'prove a negative' it imposed a '[prosecutorial] burden virtually impossible to discharge' and which was not constitutionally required. Miller v. California, 413 U.S., at 22, 37 L.Ed.2d 419. *Since Miller permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did Memoirs, and since the jury convicted these petitioners on the basis of an instruction concededly based on the Memoirs test, petitioners derive no benefit from the revision of that test in Miller.*" (Emphasis added.)

It is therefore submitted that the District Court erroneously concluded that California's obscenity statutes fail to meet the standard set forth by this Court in *Miller v. California.*

II. The Federal Court Should Have Abstained from Intervention in Ongoing State Criminal Proceedings.

In a series of recent decisions, this Court has outlined the policy which must be followed by Federal courts when asked to intervene by way of injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court. In *Younger v. Harris*, 401 U.S. 37 (1971), this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U.S., at p. 46. Similarly, federal declaratory relief has been held improper when a prosecution involving the challenged statute is pending. *Samuels v. Mackell*, 401 U.S. 66 (1971). Most recently, in *Steffel v. Thompson*, 415 U.S. 452 (1974), this Court stated:

> "Sensitive to principles of equity, comity, and federalism, we recognized in *Younger v. Harris, supra*, that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant

> that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . .' *Robb v. Connolly,* 111 U.S. 624, 637, 28 L.Ed. 542, 4 S.Ct. 544 (1884)." *Id.* at pp. 460-461. See also *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

The clear holding of these cases may be summarized as follows: absent exceptional and extremely limited circumstances, Federal courts must not intervene, either by injunction or declaratory judgment, in an existing state prosecution. Such interference with state court criminal proceedings is not justified except when there is a danger of great, immediate and irreparable injury to the federal plaintiff, where the state law is flagrantly and patently violative of express constitutional prohibitions, or where there is a showing of bad faith, harassment or other unusual circumstances that would call for equitable relief. *Mitchum v. Foster,* 407 U.S. 225, 230 (1972). This policy of abstention rests on Federal recognition that state courts share a responsibility to protect the constitutional rights of the plaintiff in the Federal action. Crucial to the inquiry on the issue of abstention, therefore, is the existence of a state court action in which those constitutional claims may be considered by the state courts.

We submit that, contrary to the finding by the District Court, there was a pending state prosecution against plaintiffs herein, and that there existed none of the exceptional circumstances outlined above. Accordingly, abstention was appropriate in this case.

At the outset we submit that the District Court erroneously concluded "Plaintiffs here have no prosecutions pending against them, and have made no allegations that any are threatened", in support of the determination that abstention was improper. On the contrary, it must be concluded that there was an ongoing state prosecution at the commencement of the federal proceedings in this case. This conclusion is compelled by any of several factors.

The record indicates that on November 26, 1973, three days prior to the filing of the complaint in the District Court, appellees were *named defendants* in an action brought by appellants in the Orange County Superior Court. (Indeed, this fact appears in the affidavit by counsel for appellees, appended to the complaint filed herein in the District Court.) By this action appellants sought an order for seizure of all copies of the film "Deep Throat" in appellees' possession, following an adversary hearing in which appellants sought to prove that film obscene under California law. Following a declaration of their view that the California Superior Court lacked jurisdiction to conduct such a hearing, appellees declined to participate further in those proceedings. We submit, however, that this action must be deemed an ongoing state prosecution within the meaning of *Younger v. Harris, supra,* and *Samuels v. Mackell, supra.* Various lower federal courts have adopted this view, reasoning that such state actions for injunctions are criminal prosecutions on the theory that such actions are of a quasi-criminal nature, intended as an equitable remedy against criminal conduct. *Maseo v. Cannon,* 326 F.Supp. 1315, 1317 (D.C. Ed. Wis. 1971). See also *McCue v.*

City of Racine, 330 F.Supp. 466, 468 (D.C. Ed. Wisc. 1971), *vacated on other grounds,* 351 F.Supp. 811 (1972). Most significantly, this hearing, together with the exercise of appellate remedies in the California Court of Appeal following any adverse result, provided appellees with a state court forum and an opportunity to air each of the Federal Constitutional challenges which were the subject of the federal action herein. It is precisely this availability of a state court forum, together with principles of comity and equity which underlie the doctrine of abstention.

Moreover, the apparent conclusion of the three-judge panel that the prior holding of the California Court of Appeal in *People v. Enskat,* 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), represented the law in California, unchallengeable except in a subsequent case before the California Supreme Court, is erroneous. It is a well settled proposition of California law that an opinion of the California Court of Appeal of one district is not binding as precedent on a Court of Appeal of another district, and is, instead, entitled to only as much weight as the logic of the opinion commands. See *People v. Cisneros,* 34 Cal.App.3d 399, 427, 110 Cal.Rptr. 269 (1973); *People v. Muir,* 244 Cal.App.2d 598, 603, 53 Cal.Rptr. 398 (1966); *Richard v. Degen and Brady, Inc.,* 181 Cal.App.2d 289, 303-304, 5 Cal.Rptr. 263 (1960). Appellees' appellate forum would have been in the California Court of Appeal, Fourth District. *Enskat* is an opinion of the California Court of Appeal, Second District. Nor does the fact hearing was denied by the California Supreme Court in *Enskat* compel the conclusion that the decision must be followed as to all the reasoning included therein. *In re Henley,* 9 Cal.App.3d 924, 931, 88 Cal.Rptr. 458 (1970). In any event, as a part of appellees' California appellate remedies they would have been entitled to petition for hearing in the California Supreme Court, seeking review

of any unfavorable ruling by California's intermediate appellate court. Thus, this pending state court prosecution provided appellees with a state forum as envisioned in the policy previously enunciated by this Court. It is absurd to suggest that appellees' determination not to participate in those proceedings permits the conclusion that there was no ongoing state prosecution.

On a wholly independent basis, it must be recalled that, following the original seizures of the film pursuant to validly issued search warrants, criminal complaints were filed in state court on November 26, 1973. By these complaints it was alleged that appellees' agents and employees had violated California's obscenity statutes by exhibition of those films. These state court prosecutions were obviously ongoing at the time of the filing of the federal complaint, and we submit that a clear-cut identity of interest existed between appellees and the defendants in the state court criminal action. It must be recognized, after all, that the films which constituted the subject matter of the state criminal action were those to which appellees enjoyed a right to possession. In this vein it should be observed that yet another theory exists in support of the conclusion that appellees were subject to an ongoing state prosecution. Those films which had been seized and which were the object of the criminal prosecution were subject to the provisions of California Penal Code section 312, which declares:

> Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Thus, as the films themselves were the subject of a proceeding which must be regarded as *in rem* in character in association with the state court prosecution, appellees' ownership of those films necessarily involved them in the ongoing state criminal action. Significantly, appellees were entitled to seek return of that property at the conclusion of the criminal proceeding, in the event that convictions were not obtained, by a claim and delivery action. See *Barnhard v. Municipal Court,* 142 Cal.App.2d 324, 337, 298 P.2d 679 (1956). The return of those films to appellees would also be the result of any successful challenge to the prosecution by the defendants throughout the course of the criminal proceedings. Thus, for example, the motion to suppress the evidence as illegally seized, made by appellees' agent Bailey in the state criminal proceeding pursuant to the provisions of California Penal Code section 1538.5 must be deemed to represent appellees' interest, as well as his own. By the forum available in that motion, as well as the full range of appellate procedures available under state law in the event of an adverse ruling therein, appellees were also provided with a state forum in which to vindicate the Federal Constitutional claims which constitute the subject of the federal action herein. Thus, we submit, the District Court erroneously failed to recognize that the state prosecution of appellees' agents, ongoing at the time of the filing of federal action, constituted a state court prosecution involving appellees' property interests, and that, due to the identity of interests, that prosecution ought to have been deemed a state prosecution within the meaning of *Younger* and *Samuels.* In a substantially analogous situation Chief Justice Burger recently observed in his concurring opinion in *Allee v. Medrano,* ..... U.S. ....., 40 L.Ed.2d 566 (1974):

> "To the extent that they can prove standing, the individual appellees will be seeking federal court interference in their own state court prosecutions. The Union, to the extent that it has standing, will be seeking interference with state court prosecution of its members. There is an identity of interest between the Union and its prosecuted members; the Union may seek relief only because of the prosecutions of its members, and only by insuring that such prosecutions cease may the Union vindicate the constitutional interests which it claims are violated. The Union stands in the place of its prosecuted members even as it asserts its own constitutional rights. The same comity considerations apply whether the action is brought in the name of the individually arrested Union member or in the name of the Union, and there is no inequity in requiring the Union to abide by the same legal standards as its members in suing in federal court. If the Union were unable to meet the requirements of Younger, its members subject to prosecution would have a full opportunity to vindicate the First Amendment rights of both the Union and its members in the state court proceedings. Any other result would allow the easy circumvention of Younger by individuals who could assert their claims of First Amendment violation through an unincorporated association of those same individuals if the association is immune from Younger burdens." *Id.* at pp. 589-590.

Plainly, to order return of the property, already found presumptively obscene by California courts, constituted an unwarranted intrusion and intervention in a valid ongoing state prosecution. In *Perez v. Ledesma, supra,* 401 U.S. 82 (1971), this Court noted:

> "Although the three-judge Court declined to issue an injunction against the pending or any future prosecutions, it did enter a suppression order and require the return of all the seized material to the appellees. . . .

> *It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings."* (Emphasis added.) *Id.* at pp. 83-84.

While it is true that the parties in the state court proceeding had entered into a stipulation by which it was agreed that, for the purposes of the criminal trial, only one film would be shown and all seized copies would be deemed the same, it is equally true that, once returned to appellees, the other copies of the film would be beyond the reach of the state court. The effect, of course, would be to render California Penal Code section 312 inoperable.

Yet another factor exists which compels the conclusion that abstention was appropriate to avoid intervention in an ongoing state prosecution. It must be recalled that the criminal complaint pending in state court was amended on January 15, 1974, to include appellees. Thus, at the first time in this case at which the District Court considered the question of abstention, there was a pending state prosecution against appellees.

Parenthetically, we do not agree with Judge Lydick's conclusion that the question of abstention should be deferred for consideration by the three-judge panel. We submit that Judge Lydick's conclusion that the appropriateness of abstention is an "ancillary" question which "may be heard and determined only by a district court of three judges" is incorrect. On the contrary, we submit, if the allegations in the complaint and supporting affidavits are insufficient to show exceptional circumstances which would warrant intervention by Federal courts in state prosecutions, there is no need for the convening of a three-judge court and the District Court should dismiss without a hearing on

the merits. This view has been adopted by District Courts in the same district in which the case under review was filed. See *Inland Empire Enterprises, Inc. v. Morton,* 365 F.Supp. 1014, 1019 (D.C. CD. Cal. 1973); *Veen v. Davis,* 326 F.Supp. 116, 120-121 (D.C. CD. Cal. 1971). See also *Harrington v. Arceneaux,* 367 F.Supp. 1268, 1270 (D.C. WD. La. 1973); *Alga, Inc. v. Crossland,* 327 F.Supp. 1264, 1266 (D.C. ND. Ala. 1971). In view of Judge Lydick's specific finding that there had been no harassment by appellants, together with the absence of exceptional circumstances herein, we submit that abstention was appropriate. Judge Lydick's dismissal of the action on that ground would have been reviewable in the Court of Appeals for the Ninth Circuit.

Nevertheless, it is submitted that the pending state court prosecutions of appellees *at the time the issue was considered by the three-judge panel* should control on the question of the existence of such an ongoing state action. In its supplemental opinion of September 30, 1974, the District Court concluded that this Court's holding in *Steffel v. Thompson, supra,* 415 U.S. 452 (1974), dictates that the absence of a state criminal prosecution against the federal plaintiff at the time the federal action is filed compels the conclusion that no such prosecution is pending, even if commenced after the federal action is filed. This, we submit, constitutes a misapplication of the doctrine of *Steffel.* The significant distinction in *Steffel* is the fact that in that case the petitioner was confronted with the unenviable choice of breaking state law and subjecting himself to certain arrest, or in abandoning the exercise of what he construed to be constitutionally protected activities. Petitioner determined not to break the state law and be subjected to arrest; petitioner was therefore without a forum in which to vindicate

his constitutional claims. Concluding that federal abstention was improper in such circumstances, this Court noted:

> "In addition, while a pending state prosecution provides the Federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally floating state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Id.* at p. 462.

Thus, we perceive three possible situations. First, where a state criminal prosecution has been commenced prior to the filing of the federal action, the clear command of *Younger* and *Samuels* is Federal abstention. At the other extreme, where, as in *Steffel,* the federal plaintiff determines not to break the state law and is thus without an opportunity to vindicate his constitutional challenge to the questioned statute, abstention is improper. The third situation appears in the instant case. *Here the federal plaintiff elected to engage in the conduct which constituted a violation of the state statute.* In such circumstances two possible courses of action were open to the state authorities. If, on the one hand, the authorities determined *not* to prosecute appellees, and appellees could not objectively demonstrate the prospect of any such prosecution by some conduct by appropriate state officials, it is submitted that appellees would lack standing to prosecute the federal action. See *Younger v. Harris, supra,* 401 U.S., at p. 42. On the other hand, should the state authorities initiate prosecution, appellees would be presented with the state court forum which justifies abstention. We respectfully submit that if the doctrine of abstention is not applied in this circumstance, the

federal plaintiff may indulge in the conduct forbidden by state law with impunity, seeking refuge in the Federal courts where he may attack the state statute, provided only that he files his complaint there before state authorities may properly investigate and commence criminal proceedings. A rule which promotes such a "race to the courthouse" is not only unseemly, but also is clearly destructive of the policy enunciated by this Court in *Younger* and *Samuels.* An example is illustrative. In *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), this Court commented with approval on the Georgia civil procedure employed in that case before criminal prosecution:

> "This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Id.* at p. 55.

We submit, however, that state authorities would be disinclined to exercise this civil remedy, aware that, if they did not file the criminal proceeding with all haste, the state defendant could seek sanctuary in Federal court from whence he could attack the state statutes, unfettered by the abstention doctrine. Such a result would plainly be antagonistic to those principles recognized in *Fenner v. Boykin,* 271 U.S. 240 (1926), which this Court reiterated in *Younger v. Harris, supra*:

> ". . . 'Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecution offenders against the laws of the State and must decide when and how this is to be done. The

accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.' *Id.*, at 243-244, 70 L.Ed. at 927." 401 U.S., at p. 45.

Finally, we submit that the three-judge court's conclusion that seizures of the four different copies of the film, as well as amendment of the state criminal complaint to include appellees as defendants in that prosecution, could be viewed as evidence of harassment is patently erroneous. In its Memorandum Opinion of June 4, 1973, the three-judge panel stated:

> "Finally, the objective facts set forth in this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie 'Deep Throat' out of Buena Park."

We submit that a review of the record before that court does not justify this conclusion. In *Perez v. Ledesma, supra*, this Court stated:

> ". . . Only in cases of *proven* harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." 401 U.S., at p. 85.

Thus, harassment and bad faith are shown in those circumstances where state officials arrest or otherwise harass an

individual in an effort to discourage the exercise of protected rights, but with no intention of pressing charges or with no expectation of obtaining a conviction. *Cameron v. Johnson*, 390 U.S. 611, 659 (1967); *Gordon v. Christenson*, 317 F.Supp. 146, 149 (D.C. Cd. Utah 1970); *Mitchum v. McAuley*, 311 F.Supp. 479, 481 (D.C. ND. Fla. 1970). Moreover, plaintiffs in such cases have a heavy burden to show that the state is not making a good faith effort in commencing such a prosecution. Presumptively, the state in the exercise of its police power is doing so for a legitimate end. *Mitchum v. McAuley, supra*, at p. 481. See also *Inland Empire Enterprises, Inc. v. Morton, supra*, 365 F.Supp. at p. 1016.

Totally ignored by the three-judge court in this case is the fact that each of the seizures of the *four different* versions of the subject film were made pursuant to validly issued search warrant (A. p. 63). Significantly, each of the films were the subject of a different count of an alleged violation of California's obscenity statute. Further, on the same factual basis Judge Lydick concluded that there was no indication of bad faith or harassment. There is not the slightest indication that these actions were undertaken without expectation of obtaining valid convictions. Rather, absent unwarranted intervention by the federal court herein, we submit that the record indicates that this was the valid exercise of authority by appellants who are charged with the responsibility of enforcement of state law.

For all of the foregoing reasons, therefore, appellants respectfully submit that federal abstention was appropriate in this case. Accordingly, it was error for the District Court, ignoring the policies set forth by this Court, to refuse to abstain from the exercise of its equitable power.

III. The Three-Judge District Court, Improperly Constituted Under Title 28, United States Code, Section 2284, Lacked Jurisdiction to Proceed.

Appellants submit that the three-judge District Court herein was not duly constituted under the provisions of Title 28, United States Code, section 2284, and thus lacked jurisdiction to hear the matter and to grant injunctive relief. That statute provides:

> In an action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, *who shall designate two other judges,* at least one of whom shall be a circuit judge. Such judge shall serve as members of the court to hear and determine the action or proceeding.

Plainly, the procedure with respect to the composition of the three-judge court dictated by the statute was not followed in this case.

The record herein indicates that the case was originally assigned to District Judge Warren J. Ferguson, who disqualified himself from participation in the case (See Appendix at p. 20). The request for injunction was then submitted to District Judge Lawrence T. Lydick. Judge Lydick denied appellees' request for a temporary restraining order, finding that, on the basis of the affidavits before him, such an order would be improper due to the failure of appellees to make any showing whatever that appellants had acted in bad faith. Judge Lydick did, however, determine that a three-judge court should be impaneled to decide the constitutionality of the statute, and duly certified the case to the Chief Judge of the Circuit in accordance with the provisions of Title 28, United States Code, sections 2281 and 2284. The Chief Judge of the Circuit then impaneled *three* judges: United States District Judges William G. East and Warren J. Ferguson and United States Circuit Judge Walter Ely. Thus, in plain contravention of the specific command of the statute, District Judge Lydick, the district judge to whom the application for injunction had been presented, was not included on the three-judge panel. In his stead, the Chief Judge named United States District Judge Warren J. Ferguson, who had originally disqualified himself. No explanation as to how Judge Ferguson became less disqualified to sit in the case is to be found in the record.

The statutory requirement that "the district judge to whom the application for injunction or other relief" *shall* constitute one member of such court is integral to the purpose of the statute as that particular judge is the one who makes the preliminary determination that the impanelment of a three-judge court is required. Moreover, he is the judge to whom the case is remanded once the purpose for which the three-judge court was convened has been concluded. See, *Public Service Com. v. Brashear Freight Line*, 312 U.S. 621, 625 (1941). Thus, federal courts have correctly concluded: "The court of three judges is not a different court from the District Court, but is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made." *Jacobs v. Tawes*, 250 F.2d 611, 614 (4th Cir. 1957). Significantly, Judge Lydick's opinion absolved appellants of any wrongdoing. The three-judge court, however, based on the *same* evidence which was before Judge Lydick, concluded that the "uncontroverted facts" demonstrated harassment.

The statute provides that *only* a court composed as mandated by the statute can hear and determine the matter. The word "shall" is mandatory, and a three-judge District Court which does not include the judge who first heard the matter is not a court correctly composed under the statute. It is therefore submitted that the three-judge District Court impaneled herein was incorrectly composed and was without jurisdiction to proceed in the matter. It follows necessarily that any order rendered by that court is void.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed and the complaint should be ordered dismissed.

Dated: January 12, 1974

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California, *et al.*,

Appellants,

vs.

VINCENT MIRANDA, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLEES' BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California, *et al.*,

Appellants,

vs.

VINCENT MIRANDA, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLEES' BRIEF.

Jurisdiction.

Appellees contend htat the appeal herein is not within the jurisdiction of this Court under 28 U.S.C. §1253, but that such appeal lies only to the Court of Appeals. A full discussion of this contention appears in point II of the Argument, *infra.*

Questions Presented.

1. Whether the District Court had jurisdiction to enter the amendment to judgment on September 30, 1974, for the reason that timely motions under F.R. Civ.P. Rule 59(e) were pending prior to the filing of

the notices of appeal from the judgment entered June 4, 1974; and whether the premature notices of appeal may be treated as though they had been taken from the judgment as amended on September 30, 1974.

2. Whether the appeal herein is not within the jurisdiction of this Court because the District Court's judgment, as amended, grants only declaratory relief respecting the constitutionality of state statutes and, although an injunction also is granted, the injunction does not restrain the action of any state officer by restraining the enforcement, operation or execution of any state statute.

3. Whether the District Court correctly concluded, in the light of the principles enunciated in *Steffel v. Thompson* and *Heller v. New York,* and upon findings of harassment and bad faith enforcement to deter constitutional rights, that *Pullman* and federal equity abstention were not required.

4. Whether the District Court correctly held that the California obscenity statute, as interpreted by the state courts of California, fails to meet the constitutional standards mandated by the Court in *Miller v. California,* 413 U.S.15.

Statutes Involved.

In addition to the statutes listed by appellants, California Penal Code §1538.5 appears as Appendix A hereto.

Statement of the Case.

On November 29, 1973, Appellees filed their Complaint in the United States District Court for the Central District of California, invoking the jurisdiction of that Court under 28 U.S.C. §§1331 and 1343. (A.

10-19.) The Complaint alleged that Appellants, law enforcement authorities of the City of Buena Park and the County of Orange, State of California, had acted to deprive Appellees, a corporation operating a motion picture theatre in Buena Park, and the owner of the property on which the theatre is located, of rights guaranteed under the First, Fourth and Fourteenth Amendments to the United States Constitution (42 U.S.C. §1983).

The Complaint alleged that Appellants, acting under color of the state obscenity statutes, caused Appellees' theatre to cease exhibition of a film by seizing four copies of the film within two days after the theatre commenced exhibiting it, and prior to any judicial determination in an adversary proceeding that the film was obscene. It was alleged that the multiple seizures of the film, together with seizures of cash receipts present at the theatre, were undertaken for the purpose of harassing Appellees and suppressing exhibition of the film to the public. (A. 15-16.) The Complaint prayed for a declaratory judgment that the state obscenity statutes, on their face and as construed and applied to Appellees, violate the First and Fourteenth Amendments to the United States Constitution. The Complaint also prayed for an injunction against further seizures of the same film and for the return to Appellees of all but one copy on the film. (A. 19.) The Complaint also contained a prayer for damages, which later was dismissed without prejudice. (A. 7.)

The facts concerning the multiple seizures essentially were undisputed. In its Memorandum Opinion filed June 4, 1974 (Appendix "A" to Jurisdictional Statement, pp. 1-5), the court below made findings of fact respecting the seizures which Appellants do not chal-

lenge as clearly erroneous. The District Court made the following findings:

"1. On November 20, 1973, anticipating that the movie 'Deep Throat' would be exhibited in the City of Buena Park, in Orange County, California, three members of the Buena Park Police Department traveled to nearby Los Angeles County and there viewed the film in its entirety.

"2. On November 21, 1973, an affidavit and warrant were prepared describing the film, and arrangements made for a judge of a Municipal Court[1] to view the film if it was brought to Buena Park.

"3. At 12:30 P.M. on November 23, 1973, the officers, a deputy district attorney and the judge attended a showing of the film at plaintiff's theatre in Buena Park.

"4. After viewing about 45 minutes of the film, they retired to the sidewalk in front of the theatre, where the judge was presented with the previously prepared documents.

"5. A photographer hired by the theatre began photographing the judge and the officers while they reviewed the papers. One of the officers,

[1]The Judge with whom Appellants made arrangements to view the film and to receive the applications for search warrants was a judge of the Municipal Court of the Central Orange County Judicial District. (A. 36.) The theatre, however, is located in a different judicial district, the North Orange County Judicial District. (A. 92.) The seized property was turned over to the judge at his home, and the property remained in the judge's custody contrary to the applicable state law which provides that seized property is to remain in the custody of the police. (A. 37, 41.) See, California Penal Code §1536; *People v. Superior Court,* 28 Cal.App.3d 600, 607, fn. 3, 104 Cal. Rptr. 876 (1972).

acting on orders from the judge, stopped the photographer from taking any more pictures and seized the film in his camera.

"6. The search warrant was issued, and the officers seized the movie and posters advertising it. In describing the property to be seized, the warrant also contained the following handwritten addition:

'Money contained in the ticket booth & specifically for a $20.00 bill Ser. # B08574869B.'

All the cash in the box office was seized, an amount shown to be $305.00.

"7. That afternoon the theatre obtained another copy of the film for exhibition. At 3:00 p.m., the same police officers again viewed the film, and left to get another warrant. The affidavit accompanying the second warrant was an identical copy of the first, but also contains the following handwritten notation:

'Your affiant further states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. after being viewed by Judge ..... with the exception of certain portions being edited different than the first film seized.

'Your affiant states that this copy of the film "Deep Throat" consists of (1) one additional act of sexual intercourse and numerous small changes at different portions of the film.'

"8. The same Municipal Court judge signed the second warrant without seeing the film again, and the officers returned to the theatre at 4:30 p.m. Another copy of 'Deep Throat' was seized, along with some advertising posters.

"9. The typed second warrant was also an identical copy of the first, but contained the following handwritten addition in describing the property to be seized: 'Money contained in the ticket booth cash drawer.' $159.00 in cash was seized from the box office.

"10. The theatre obtained yet another copy of 'Deep Throat.' At 7:45 p.m. the same day, the same officers again returned to the theatre and viewed the film in its entirety. They then contacted the judge, who signed another search warrant at 9:00 p.m. The affidavit in support of the warrant was identical to the first and second, but contained the following handwritten notation:

'Your affiant states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. and 4:35 p.m. after being viewed by the Honorable Judge .... who issued a search warrant.

'Your affiant states that the film in question is the same film viewed by Judge ..... with the exception of certain portions of the film being edited differently than the film viewed by the Honorable Judge .....

'Your affiant states that this copy of the film "Deep Throat" consists of (1) one additional act of sexual intercourse not shown in the copy viewed by Judge ..... and numerous small changes at different portions of the film.'

"11. The judge decided he wished to view the film again, and returned with the officers to the theatre at 9:15 p.m. He ordered the officers to

execute the warrant, and a third copy of the film was seized.

"12. The third warrant was identical to the first and second warrants, but also contained this handwritten notation, describing the property to be seized: 'All monies on premises received, in cash drawers or safes at above location.' The officers brought a locksmith to the theatre, who opened the business' safe. Money from the cash drawer and the safe totaling $4,082.33 was seized.

"13. At 2:30 p.m. the following day, the same officers turned over all the seized items to the judge at his home, and advised him that they believed the movie was going to be shown again.

"14. The officers went to the theatre and viewed the film. They returned to the judge's home with another of the identical affidavits, with the same handwritten notation. At 4:00 p.m. the judge signed a search warrant identical to the first three from the day before, with an additional handwritten entry describing the property to be seized: 'All monies received, in cash drawers or safes.'

"15. The warrant was served, and another copy of 'Deep Throat', some promotional posters and $197.18 in cash were seized.

"16. The theatre ceased exhibition of the movie, closed until November 26, 1974, and thereafter began showing another film." (Jurisdictional Statement, Appendix "A", pp. 1-5).

The plans for obtaining the four search warrants were made by the Orange County District Attorney's Office, and deputy district attorneys directed the activities

of the police. (A. 37, 42, 54.) Appellants conceded that the seizure of four copies of the same film would be improper had the copies not been "different." (A. 63.) Deputy District Attorneys Sears and Anderson advised the police officers "to view every subsequent copy of the movie 'Deep Throat' and if [they] detected differences between any copies to seize them also with a new search warrant." (A. 43, 48-49, 54.) However, in none of the affidavits filed by Appellants is it claimed that the alleged "differences" between the four seized copies of the film were substantial or significant. Indeed, the affidavits in support of the third and fourth search warrants do not even claim that any differences exist among the second, third and fourth copies of the films seized. Appellants have never even claimed that so much as 30 seconds of any of the four copies is different from any of the others.[2]

The four seizures occurred on November 23 and 24, 1973. On November 26, Appellants applied for and were granted, *ex parte,* a Temporary Restraining Order against further exhibition of "Deep Throat" pending hearing on an Order to Show Cause "why all copies of the . . . film should not be ordered seized as contraband." (A. 64-65.) The Order was issued by a judge of the Superior Court for the County of Orange.

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[2]When the District Attorney's Office later sought and obtained an order from the Orange County Superior Court to seize all copies of the film "Deep Throat," only one of the four previously seized copies was exhibited to the judge. (A. 49-50, 74.) Subsequently, for purposes of the trial of the state obscenity prosecution arising out of the exhibition of "Deep Throat" at Appellees' theatre, the District Attorney's Office stipulated that the four seized copies of the film were "identical in every respect." (A. 79.) The theatre projectionist stated that he had inspected 3 of the 4 seized prints and that the three were identical to one another. (A. 30.)

The same day, Appellants filed a misdemeanor complaint against Edward Lee Bailey and James Samuel Lytell, alleging that they had violated the state obscenity statutes by exhibition of "Deep Throat" at Appellees' theatre. (A. 121.)[3]

The Order to Show Cause came on for hearing before the Orange County Superior Court on November 27, 1973. At the hearing, Appellees contended that the Superior Court was without jurisdiction to enjoin exhibition of the film, to declare it obscene, or to issue an order to seize all copies of the film. (A. 68.) Appellees filed with the Superior Court a document stating "By appearing in the above-entitled action, Defendants do not waive but, on the contrary, specifically reserve all federal constitutional claims for purposes of federal jurisdiction." (A. 75.) The Superior Court ruled that it had jurisdiction.[4] (A. 75.) The proceedings were con-

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[3]Appellants never offered an explanation as to why they chose to apply to a Superior Court judge for the Temporary Restraining Order and Order to Show Cause, after they had asked a judge of the Municipal Court of the Central Orange County Judicial District to issue the first four search warrants, and while filing the misdemeanor obscenity complaint in the Municipal Court of the North Orange County Judicial District, wherein the theatre is located. Although Appellants claimed that the four seized films were in the "custody and control" of the Municipal Court judge who issued the four search warrants (A. 37), one of the seized copies was exhibited to the Superior Court judge on November 27, 1973. (A. 62.)

[4]The nature of the proceedings in the Orange County Superior Court never was clear. The Application for Order to Show Cause and for a Temporary Restraining Order filed by Appellants in the Superior Court prayed for the issuance of an Order to Show Cause "why all copies of . . . 'Deep Throat' should not be declared obscene by this Honorable Court and why they should not be forever enjoined from further exhibition, showing, displaying, advertising, selling, or publishing said copies or any part thereof." (A. 66.) The Order to Show Cause actually issued required Appellees to "show cause why all copies

(This footnote is continued on next page)

tinued to the following day in order for the Court to view the film. Appellees were excused from returning, since they had entered solely a special appearance for the purpose of contesting jurisdiction. (A. 73.) The next day, the Superior Court viewed one of the four seized copies of "Deep Throat," heard opinion testimony that the film was obscene from the husband of Deputy District Attorney Sears (A. 73), pronounced the film obscene "beyond any reasonable doubt"[5] (A. 74), and issued an order to seize all copies of the film currently at Appellees' theatre or which might be found there at any time in the future. (A. 74.)

As aforesaid, Appellees filed their Complaint in the United States District Court on November 29, 1973. At that time, the only criminal prosecution pending with respect to the exhibition of "Deep Throat" at Appellees' theatre was the misdemeanor complaint filed against Messrs. Bailey and Lytell, theatre employees, in the Municipal Court of the North Orange County Judicial District. (A. 121.) Neither Bailey nor Lytell were plaintiffs in the federal action. The state misdemeanor complaint was not amended by Appellants to name as defendants the federal Plaintiffs, Miranda and

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of the . . . film should not be ordered seized as contraband." (A. 65.) Other than Appellants' Application for an Order to Show Cause and a Temporary Restraining Order itself, no action ever was pending in the Superior Court, either civil or criminal, with respect to exhibition of "Deep Throat" at Appellees' theatre.

[5]The Superior Court was without jurisdiction to find the film obscene "beyond any reasonable doubt." Under California law, the only legal question properly before a court asked to issue a search warrant for the seizure of alleged obscenity is whether or not there is probable cause to believe the matter obscene. Obscenity *vel non* may not be determined at such a hearing. *Monica Theater, Inc. v. Municipal Court,* 9 Cal.App.3d 1, 88 Cal.Rptr. 71 (hearing denied by California Supreme Court).

Walnut Properties, until January 15, 1974. (A. 121.) Although the federal Summons and Complaint was not officially served on all Appellants until January 14, 1974 (A. 6), Appellants appeared in Federal Court before the Honorable Lawrence T. Lydick in opposition to Appellees' Application for a Temporary Restraining Order on both November 29 and December 3, 1973. (A. 5.) Appellees' request for a Temporary Restraining Order was taken under submission by Judge Lydick until December 28, 1973, when an Order was filed denying a Temporary Restraining Order (A. 55-58) and certifying to the Chief Judge of the United States Court of Appeals for the Ninth Circuit that a District Court of three judges was required pursuant to 28 U.S.C. §2284. (A. 55.)

On January 8, 1974, the Chief Judge of the Ninth Circuit appointed a Three-Judge District Court composed of Circuit Judge Walter Ely, District Judge Warren J. Ferguson, and Senior District Judge William G. East. The Order provided that "If there be any objection to the membership of the Court as constituted, a party shall file the objection within 14 days after the date of the filing of this Order." (A. 84-85.) Although a copy of the aforesaid Order was not mailed to the parties herein until February 8, 1974 (A. 82), Appellants never raised any objection to the membership of the Three-Judge Court at any time prior to this appeal.

On June 4, 1974, the Three-Judge Court issued a Memorandum Opinion and Judgment, declaring the California obscenity statutes unconstitutional and ordering Appellants to return to Appellees the property seized from the theatre on November 23 and 24, 1973. (Appendix "A" to Jurisdictional Statement.)

On June 14, 1974, within 10 days after entry of the aforesaid judgment, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed and served a document entitled "Notice of Motion for Rehearing and Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of That Motion (F.R.C.P. 59(a), 59(e), 60(a), 60(b), and 62." (A. 90.)[6] Also on June 14, 1974, Appellants Hicks and Sears served and filed a document entitled "Notice of Motion for Relief from Judgment, For Rehearing, and For Stay of Judgment Pending Determination of That Motion" which stated that such motion was brought pursuant to F.R.C.P., Rules 60 (b) and 62. (A. 91.)[7] On June 24, 1974, the Court filed an Order stating that "The motions of the defendants filed June 14, 1974, and scheduled for hearing on July 1, 1974, will be submitted and determined without oral hearing. . . .". (A. 93.) In connection with Appellants' applications for stay of the June 4 judgment pending determination of their post-judgment motions, in which they contended that return of all four copies of the film would terminate the pending state misdemeanor prosecution, Appellees filed an affidavit on June 17, 1974, stating that they "do not oppose the granting of a stay of judgment which would permit [Appellants] to retain one copy of the film pending a determination of [Appellants'] post-trial motions, and pending appeal, should an appeal be taken." (A. 94-95.)

[6]The document further recited that "The Court will be asked to set aside the findings of fact and conclusions of law and judgment heretofore entered in that the Court erred in its ruling, the judgment is contrary to law, and the Court made errors of fact and [sic] its findings which should be corrected." (A. 90.)

[7]The Points and Authorities filed concurrently with the aforesaid document by Appellants Hicks and Sears cited the case of *Gila River Ranch, Inc. v. United States,* 368 F.2d 354, 356-357 (9 Cir. 1966) as follows: "Why should not the trial court have the power to correct its own judicial error under 60 (b)(1) within a reasonable time . . . and thus avoid the inconvenience and expense of an appeal. . . ."

On July 5, 1974, while the aforesaid post-judgment motions were under submission, Appellants filed their Notices of Appeal to this Court. (A. 9.) Notwithstanding the filing of their Notices of Appeal, Appellants continued to urge the court below to grant Appellants' various post-judgment motions.[8]

On July 26, 1974, the Appellate Department of the Orange County Superior Court[9] reversed an order made by the Municipal Court in which the misdemeanor obscenity prosecution is pending. The Muncipal Court had suppressed as evidence the third and fourth seized copies of "Deep Throat." (A. 80-81.)[10] The only issue before the Appellate Department of the Superior Court was the propriety of the Municipal Court's order suppressing as evidence in the criminal prosecution two of the four seized copies of the film. The Superior Court order of November 27, 1973, calling for the seizure of all copies of "Deep Throat"

[8]On July 30, 1974, Appellants filed Supplemental Points and Authorities in support of their post-judgment motions. (A. 114.)

[9]The Appellate Department of the Superior Court has jurisdiction to hear appeals from municipal courts in criminal matters.

[10]The Municipal Court found that the affidavits in support of the third and fourth search warrants issued for the seizure of "Deep Throat" appeared on their face to show that the second, third and fourth copies of the films seized were identical, and ordered the third and fourth copies suppressed pursuant to California Penal Code §1538.5. (A. 80-81.) California Penal Code §1538.5 provides for the suppression as evidence of property seized in violation of the Fourth Amendment. (See Appendix "A" hereto.)

which might be found at Appellees' theatre then or in the future was not appealable to the Appellate Department of the Superior Court and the Appellate Department's July 26, 1974 order did not purport to decide the validity of the November 27 order for the seizure of all copies of the film.

On July 29, 1974, Appellants embarked upon a second series of multiple seizures of films from Appellees' theatre, which had resumed exhibiting "Deep Throat", together with a film entitled "The Devil in Miss Jones." Between July 29 and August 2, 1974, Appellants seized seven additional copies of "Deep Throat" and four copies of "Devil in Miss Jones." (Findings of Fact and Conclusions of Law entered September 5, 1974, appearing as Appendix "B" hereto.) No claim was made that the copies were "different."

On August 3, 1974, Appellees applied for and were granted a Temporary Restraining Order by a member of the Three-Judge Court, enjoining Appellants from seizing any additional copies of "Deep Throat" and "Devil in Miss Jones." (Appendix "C" to Jurisdictional Statement, p. 26.)[11] Appellants also were ordered to show cause on August 12, 1974, why a Preliminary Injunction should not issue and why Appellants should not be held in contempt. Following hearing on the Order to Show Cause on August 12, 1974 before the Honorable Warren J. Ferguson, the Court vacated the Order to Show Cause *re* Contempt, and ordered that

[11]The Temporary Restraining Order is incorrectly printed in Appendix "C" to the Jurisdictional Statement. Paragraph Nos. 1 and 3 printed as part of the Temporary Restraining Order at page 28 of Appendix "C" to the Jurisdictional Statement were stricken by the Court. Only Paragraph No. 2 enjoining further seizures was issued.

a Preliminary Injunction issue, enjoining Appellants from seizing any additional copies of "Deep Throat" and "Devil in Miss Jones" from Appellees' theatre. (R. 283.) The Preliminary Injunction and Findings of Fact and Conclusions of Law with respect thereto were entered on September 5, 1974. (Appendix "B" hereto.)

On September 30, 1974, the Three-Judge Court below filed a Supplemental Memorandum Opinion (A. 120) setting forth its findings and conclusions with respect to Appellants' post-judgment motions. Pursuant thereto, the Court entered an amendment to the judgment on June 4, 1974. (The Amendment to the Judgment appears as Appendix "B" to Appellees' Motion to Dismiss or Affirm.) The amendment deleted Paragraph 2 of the June 4 judgment, requiring the return to Appellees of all four seized films and cash and added a new Paragraph 2, providing that "The [Appellants] shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the [Appellees] three of the four film prints seized from the [Appellees] on November 23 and 24, 1973 in the City of Buena Park."[12] The District Court reaffirmed its declaratory judgment that the California obscenity statutes are unconstitutional.

On October 9, 1974, Appellees applied to a member of the court below, the Honorable Warren J. Ferguson, for an Order to Show Cause why Appellants should not be enjoined from prosecuting the amended misdemeanor complaint charging Appellees and their employees with violating the state obscenity statutes by

[12]Appellants contended in their post-judgment motions that they had no power to return any of the seized films because they were in the custody of the Municipal Court. (A. 120.)

exhibition of "Deep Throat." Appellees also sought a Temporary Restraining Order enjoining the said prosecution pending hearing on the Order to Show Cause. Both the Order to Show Cause and the Temporary Restraining Order were denied by District Judge Ferguson on October 9. (R. 332.)

On October 30, 1974, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed Notice of Appeal to this Court from the Amendment to Judgment entered September 30, 1974. (R. 338.)[13]

Summary of Argument.

1. The District Court entered a judgment on June 4, 1974. Within ten days after entry of that judgment, motions seeking reconsideration by the Court of basic findings of fact and conclusions of law were both served and filed. One of the motions, to alter and amend the judgment, was made expressly pursuant to F.R.C.P. Rule 59(e). The other motions, although differently styled, nevertheless sought reconsideration of the judgment on substantially the same grounds, challenging as erroneous material findings of fact and conclusions of law made by the District Court.

The aforesaid post-judgment motions were timely made because they were served and filed within ten days after entry of the judgment, and Rule 59(e) provides that a motion thereunder be "served not later than ten days after the entry of the judgment." The

[13]The said Notice of Appeal was taken "from the amendment to judgment entered in this action on September 30, 1974 . . . and the whole of that judgment, including but not limited to the declaring [sic] the California obscenity statute . . . to be unconstitutional." (R. 338.) The said Appellants the same day filed a Protective Notice of Appeal to the Court of Appeals for the Ninth Circuit. (R. 335.)

law is clear that service of the motion constitutes its making.

On July 5, 1974, while the post-judgment motions were under submission, Appellants filed Notices of Appeal to this Court. On September 30, 1974, the court below filed a supplemental memorandum opinion setting forth its findings and conclusions with respect to the post-judgment motions and, pursuant thereto, entered an amendment to the June 4 judgment.

Rule 4(a) of the Federal Rules of Appellate Procedure provides that the running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the District Court by any party pursuant to, *inter alia*, Rule 59(e), and the full time for appeal commences to run from the entry of an order granting or denying such a motion. Moreover, any motion that draws in question the correctness of the judgment, when made within ten days following entry of the judgment, is functionally a motion under Rule 59(e) regardless of what it is styled.

It is clear that the service and filing of Appellants' variously styled post-judgment motions within ten days after entry of the June 4 judgment, destroyed the finality of that judgment, and rendered the Notices of Appeal filed on July 5, 1974, premature. Because the said Notices of Appeal were premature, the District Court had jurisdiction to pass upon Appellants' post-judgment motions and to enter the amendment to judgment on September 30, 1974. The governing law provides that the improvident taking of an appeal cannot effectively destroy the authority of the court below to proceed upon motions properly before it.

The provisions of Rule 4(a) of the Federal Rules of Appellate Procedure, providing that the service and

filing of certain motions terminates the running of the time for appeal, are based upon rules of reason developed from the case law and the principle behind them is applicable to appeals to this Court. This Court has held that a direct appeal was premature where a motion to amend the district court's findings was pending at the time the notice was filed and that, notwithstanding the filing of such premature notice of appeal, the district court was not deprived of jurisdiction to pass upon the pending motion.

It follows that the District Court had jurisdiction to decide the post-judgment motions and to enter the amendment to judgment on September 30, 1974. Although only certain of the Appellants have filed Notice of Appeal to this Court from the amendment to judgment entered September 30, it would appear that the premature Notices of Appeal should be treated as having been taken from the judgment as amended on September 30.

2. Under 28 U.S.C. §1253, an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. §2281 provides that a three-judge court is required to hear an application for an interlocutory or permanent injunction restraining the enforcement of any state statute by restraining the action of any state officer in the enforcement or execution of such statute upon the ground of its unconstitutionality.

It is submitted that the amendment to the judgment entered by the District Court on September 30, requiring Appellants to petition the state court to return to

Appellees three of the four seized film prints, is not within the direct appeal jurisdiction of this Court because it is not an injunction restraining the enforcement, operation or execution of a state statute upon the ground of the statute's unconstitutionality.

Other than the aforesaid injunction, the District Court granted only declaratory relief with respect to the state obscenity statutes. It is firmly established that §1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone, but such appeal lies only with the Court of Appeals. This Court has emphasized repeatedly that §1253 is to be narrowly construed since loose construction would defeat the congressional purpose to keep within narrow confines the appellate docket of this Court.

Appellants' jurisdictional claim is that the District Court's orders of June 4 and September 30, respecting the return of seized film prints are injunctions within the meaning of 28 U.S.C. §1253, relying upon the decision in *Perez v. Ledesma,* 401 U.S.82. In *Perez,* this Court held that it had direct appeal jurisdiction over an order of a three-judge court returning all property seized as allegedly obscene to its owner and suppressing the property as evidence in a pending state criminal prosecution. Such order operated to terminate the pending prosecution and constituted an injunction against enforcement of the state obscenity statute.

The District Court's judgment of June 4 ordered all four prints of the film seized returned to Appellees. However, the judgment was amended on September 30 to provide that only three of the four seized prints be returned, permitting Appellants to retain one complete copy. Since Appellants had stipulated that only one

copy of the film was necessary for the trial of the state obscenity prosecution, the amended judgment neither terminates, disrupts, nor even affects the state prosecution. Appellants' reliance upon *Perez v. Ledesma* as conferring jurisdiction on direct appeal is thus misplaced.

Appellees' prayer for return of three of the four copies of the film seized rests upon a legal theory independent of the claim that the California obscenity statute is unconstitutional. Appellees contended in the court below that multiple seizures of the same film upon search warrants issued *ex parte,* violated the constitutional mandate of *Heller v. New York,* 413 U.S.483. The District Court's declaration that the California obscenity statutes are unconstitutional is not an indispensable prerequisite to its order requiring the return of three of the four film prints seized.

At the time Appellees' Complaint was filed, the prayer for an injunction to return seized property had the potential of restraining state officials in the enforcement of the state obscenity statutes, as in *Perez v. Ledesma.* The Complaint thus was viewed properly as requiring the convening of a three-judge court. Nevertheless, when it was stipulated that only one copy of the film was needed for the state obscenity prosecution, and when the District Court amended its judgment to permit Appellants to retain one copy of the film, the result is that the District Court's judgment, as amended, simply does not have the effect of restraining state officials in the enforcement of the state obscenity statutes.

With respect to this Court's direct appeal jurisdiction, this case is no different from those in which a properly convened three-judge court grants only declaratory relief with respect to the constitutionality of a

state or federal statute. This Court has eschewed literal interpretation of 28 U.S.C. §1253, looking instead to the basic policies therein expressed. Where, as here, a three-judge court grants only declaratory relief respecting the constitutionality of a state statute, and also grants an injunction to resolve fully the controversy between the parties, but which injunction does not restrain the enforcement of any state statute, the appeal should lie with the Court of Appeals in the first instance.

3. If the Court should proceed to a decision on the merits, it is submitted that the judgment of the District Court was correct. Neither the doctrine of abstention nor comity restraint was applicable in light of the facts which gave rise to the litigation. *Pullman* abstention was not required. The California courts have authoritatively construed the California statute and held that the *Miller* requirements have been met. Any defense in the state court that the statute was defective under the Federal Constitution would, therefore, be precluded. *Pullman* abstention is required only where applicable state law is unclear and where a state court interpretation of the state law question might obviate the necessity of deciding the federal constitutional issue.

Reliance by Appellants upon *Younger* is misplaced. In the first place, *Younger* presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. In light of the ruling in *Enskat,* relegation to the state courts for a determination of the constitutional validity of the state statute would be futile. Moreover, the complaint prayed only for declaratory relief; an application for an order to show cause and temporary restraining order enjoining the criminal prosecution was denied;

and the Appellants were permitted to retain a copy of the motion picture film for use in the criminal proceedings. This is not a case involving the interruption or disruption of state proceedings, nor is it a case where the state proceedings offer a vehicle for vindicating Appellees' constitutional rights.

The decision of the Court in *Steffel v. Thompson* is clearly applicable. When the constitutionality of a state criminal statute is challenged in federal court, declaratory relief is appropriate if the plaintiff demonstrates a genuine threat of enforcement and the state criminal proceedings are not pending at the time the federal suit is commenced. At the time the complaint was filed by these Appellees, who were, respectively, the owner of the land where the theatre is located and the corporation engaged in the business of operating a motion picture theatre on the same property, no criminal proceeding was pending against them. The attempt by Appellants to argue that state criminal proceedings were vicariously pending against Appellees because a criminal complaint had previously been filed against theatre employees is without foundation. Initially, it should be noted that since the state courts have authoritatively decided that the state statute is constitutional, the Appellees lack an adequate remedy in the state courts for vindication of their federal claims. Moreover, the interests of the owner of the property and the operator of the theatre are distinct from those who were employed temporarily at the theatre. The vindication of Appellees' rights under the Civil

Rights Act should not be thwarted by a theory of "imputing" to Appellees a state criminal prosecution against other persons who may not necessarily raise constitutional issues as part of their defense, or who may be acquitted on other grounds, or who may decide not to appeal their convictions.

The contention that a state action may be deemed "pending" if the federal plaintiff is arrested or indicted after the federal complaint is filed also appears untenable. Such an approach would provide a ready device for state prosecutors to remove from the federal to the state court the litigation of constitutional claims made by the federal plaintiff. In the case herein, the District Court found that the subsequent institution of the criminal proceedings was in retaliation for the attempt by Appellees to have their constitutional rights judicially determined in the federal court. The effort to deprive the federal court of jurisdiction was manifest.

Since the undisputed facts called for the application of the principles enunciated in *Steffel*, the District Court correctly concluded that the strict requirements of *Younger* were only of tangential relevance to the issues involved in the case. Nevertheless, the findings and conclusions of the District Court were correct in establishing that the prosecutors and police in this case employed a scheme of harassment in bad faith to discourage the exercise of First Amendment rights. The objective criteria for determining bad faith official activity under the aegis of a challenged statute were

abundantly satisfied. The objective of the officials was suppression; the means used to attain the unlawful objective were harassment and bad faith enforcement. These were the findings of the District Court, and such findings were clearly not erroneous. The actions of the officials were not only lawless, but a deliberate attempt to circumvent the principles enunciated in *Marcus, One Quantity of Books, Heller* and *Roaden*. The arguments on behalf of the respective Appellants are without merit, and the decisions relied upon by the Appellants are either irrelevant or, rightly considered, opposed to appellants' positions.

4. In *Miller v. California,* 413 U.S.15, this Court sought to reduce the admitted chaos permeating the law of obscenity by holding that no statute regulating obscenity would pass constitutional muster unless the regulating law, as written or construed, specifically defined the sexual conduct subject to prohibition. The Court held that the *Roth-Memoirs* test was unworkable and failed to provide adequate guidelines. The Court also condemned the "casual practice" of *Redrup* pursuant to which courts were judging publications on a subjective basis.

The California Legislature has defined obscenity solely in *Roth-Memoirs* language. The statute as written does not enumerate proscribable sexual conduct. Plainly, the California statute as written fails to meet the *Miller* specificity requirement. In *People v. Enskat,* 33 Cal.App.3d 900, 109 Cal.Rptr. 433, the California Court of Appeal acknowledged that the statute as

written was defective, but concluded the pre-*Miller* decisions satisfied *Miller. Enskat* made no effort to give a *new* construction to the statute to bring it into harmony with *Miller,* observing that that was a legislative and not a judicial function. *Enskat,* in examining the pre-*Miller* cases, concluded that, under the statute, only hard core pornography is prohibited, *i.e.*, "graphic depictions of sexual activity" and "nudity with sexual activity". Impliedly recognizing that these general terms are lacking in precision, the court held that California was not required to meet the *Miller* specificity test because California retained the *Memoirs* "utterly without redeeming social value" test.

After *Enskat* examined the California statute in light of *Miller* and found it constitutional, the District Court rendered its decision invalidating the statute. The District Court found the statute, as written, unconstitutional. The District Court also found that the statute as construed by *Enskat* clearly failed to meet the requirements of *Miller*. Finally, the District Court found "particularly specious" the argument in *Enskat* that the retention of the ambiguous "utterly without redeeming social value" test dispensed with the due process specificity requirement of *Miller*.

The Appellants herein, the Attorney General of the State of California and the District Attorney of Orange County, are in substantial disagreement as to the correct meaning of the statute. The Attorney General argues that *Miller* does not require a "blueprint" of proscribed sexual conduct and asserts that general

terms, such as "hard core pornography", "graphic depictions of sexual activity" and "nudity with sexual activity", are sufficiently precise. The District Attorney, on the other hand, seeks to read specific sexual conduct into the statute. The Attorney General and the District Attorney are also in disagreement as to whether the proscribed "sexual acts" include simulated acts. The disagreement between the law enforcement officials stems from the fact that the statute as written is defective and *Enskat* and the pre-*Miller* decisions speak only in generalities.

The District Court was clearly correct in concluding that the California statute as written and construed lacks the necessary precision and concreteness required by the Constitution.

Unless the *Miller* specificity requirement is overruled, the District Court's holding that the California statute is unconstitutional must be affirmed.

ARGUMENT.

I

The District Court Had Jurisdiction to Enter the Amendment to Judgment on September 30, 1974, Because Timely Motions Under F.R.Civ.P. Rule 59(e) Were Pending Prior to the Filing of the Notices of Appeal From the Judgment Entered June 4, 1974. However, the Premature Notices of Appeal May Be Treated as Though They Had Been Taken From the Judgment as Amended on September 30, 1974.

The District Court entered a judgment on June 4, 1974. On June 14, 1974, within 10 days after entry of the judgment, motions seeking reconsideration by the Court of basic findings of fact and conclusions of law were both served and filed. Appellants Gourley, Fontecchio, Hafdahl and Harrison served and filed a document entitled "Notice of Motion for Rehearing and Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of that Motion (F.R.C.P. 59(a), 59(e), 60(a), 60(b), and 62)." (A. 90.) On the same day, Appellants Hicks and Sears served and filed a document entitled "Notice of Motion for Relief from Judgment, for Rehearing, and for Stay of Judgment Pending Determination of that Motion" which stated that such Motion was brought pursuant to F.R.C.P. Rules 60(b) and 62. (A. 91.) Although differently styled, both Motions sought reconsideration of the judgment on substantially the same grounds, challenging as erroneous certain material findings of fact and the conclusions of law made by the District Court in its Memorandum Opinion accompanying the judgment.

Appellants' Motions were "made" on June 14, 1974, the day they were served and filed, notwithstanding the fact that the Motions contained a notice that they were to be heard on July 1, 1974. F.R.C.P. Rule 59(e) provides that a motion to alter or amend a judgment be "served not later than 10 days after the entry of the judgment." It is clear that it is the service of the motion that constitutes its making. See, *Claybrook Drilling Company v. Divanco,* 336 F.2d 697 (10 Cir. 1964) (impliedly overruling the contrary holding cited by Appellants [Hicks Op. Br., pp. 30-31] in *Wagoner v. Fairview Consol. School Dist. No. 5,* 289 F.2d 480 (10 Cir. 1961); 9 Moore's Federal Practice §204.12 [2], text accompanying footnotes 11, 12 and 13.

On June 24, 1974, the District Court filed an order stating that "The motions of the defendants filed June 14, 1974, and scheduled for hearing on July 1, 1974, will be submitted and determined without oral hearing. . . ." (A. 93.) On July 5, 1974, while the aforesaid post-judgment motions were under submission, Appellants filed their Notices of Appeal to this Court. (A. 9.) On September 30, 1974, the District Court filed a Supplemental Memorandum Opinion (A. 120) setting forth its findings and conclusions with respect to Appellants' post-judgment motions and, pursuant thereto, entered an amendment to the June 4 judgment. (The amendment to the judgment appears as Appendix "B" to Appellees' Motion to Dismiss or Affirm.)

Rule 4(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

> "The running of the time for filing a notice of appeal is terminated as to *all* parties by a timely motion filed in the district court by *any* party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such Rules: . . . (3) granting or denying a motion under Rule 59 to alter or amend judgment. . . ." (Emphasis added.)

Moreover, any motion that draws in question the correctness of the judgment, when made within 10 days following entry of the judgment, is functionally a motion under Rule 59(e) regardless of what it is styled. Thus a motion "to reconsider" is treated as though it were a motion under Rule 59(e) and will destroy the finality of the judgment if, as here, the motion is timely made. See, *e.g., Hicklin v. Edwards,* 222 F.2d 921 (8 Cir. 1955); 9 Moore's Federal Practice, §204.12[1], text accompanying footnote 6. In addition, even though a motion for relief from a judgment under F.R.C.P. Rule 60(b) does not ordinarily affect the finality of a judgment, nevertheless where, as here, a motion labelled a Rule 60(b) motion is made not later than 10 days after entry of judgment, it is also a Rule 59(e) motion and will destroy the judgment's finality. See, *e.g., Woodham v. American Cystoscope Company,* 335 F.2d 551, 554-555 (5 Cir. 1964); 9 Moore's Federal Practice §204.12[1], text accompanying footnotes 10 and 11.

If the foregoing principles are applied to the present case, it is clear that the service and filing of Appellants' variously styled post-judgment motions within 10

days after entry of the June 4 judgment, destroyed the finality of that judgment, and rendered the Notices of Appeal filed on July 5, 1974, premature. Further, because the said Notices of Appeal were premature, because taken while timely motions under Rule 59(e) were pending, the District Court had jurisdiction to pass upon Appellants' post-judgment motions and to enter the amendment to judgment on September 30, 1974. See, *United States v. Crescent Amusement Company,* 323 U.S.173, 177-178; *Healy v. Pennsylvania R.R.,* 181 F.2d 934 (3 Cir. 1950); *Turner v. HMH Publishing Company,* 328 F.2d 136 (5 Cir. 1964); *Tucker v. Redding Company,* 53 F.R.D. 453 (D.C. Pa. 1971); 11 Wright & Miller, Federal Practice and Procedure §2821; 9 Moore's Federal Practice, §203.11, text accompanying footnote 14.

Appellants' reliance upon *United States v. Frank B. Killian,* 269 F.2d 494 (6 Cir. 1959) and *Keohane v. Swarco, Inc.,* 320 F.2d 429 (6 Cir. 1963) [Hicks Op. Br., pp. 29-30] appears misplaced. In *Killian,* a Rule 60(b) motion was filed by appellant on the same day that it filed notice of appeal from the judgment. The motion was filed more than 10 days after the judgment was entered. Accordingly, the Court held that the motion did not destroy the finality of the judgment and the notice of appeal was therefore effective to deprive the trial court of power to entertain the motion. The *Keohane* case does take the seemingly inconsistent view that the taking of an appeal even though from a non-appealable order nevertheless transferred jursidiction to the Court of Appeals and deprived the District Court of jurisdiction to pass upon the motion to amend the judgment pending at the time the notice of appeal was filed. The position of

the Court in *Keohane* is contrary to the holding in *United States v. Crescent Amusement Company,* 323 U.S.173, 177-178, and, moreover, relied upon a decision of the Ninth Circuit, *Merritt-Chapman & Scott Corp. v. City of Seattle,* 281 F.2d 896 (1960), which subsequently was overruled in *Ruby v. Secretary of the United States Navy,* 365 F.2d 385 (9 Cir. 1966). In *Ruby,* the Court held that the improvident taking of an appeal cannot effectively destroy the authority of the court below to proceed upon motions properly before it.

> "Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction." (365 F.2d at 389.)

See also, 9 Moore's Federal Practice §203.11, text accompanying footnotes 13 through 20.

Most of the cases discussed above rely upon Rule 4(a) of the Federal Rules of Appellate Procedure, providing that the service and filing of certain motions terminates the running of the time for appeal and that the full time commences to run anew from the date of an order disposing of such motions. While Rule 4 applies to appeals from district courts to courts of appeals, the provisions of the Rule respecting the effect of timely post-judgment motions on the time for appeal and the finality of judgments are based upon rules of reason developed from the case law and the principle behind them is applicable to appeals to this Court. The principle is that a post-judgment motion that has

the potential for setting aside or modifying the judgment destroys its finality until the motion is acted upon by the court that rendered the judgment. *Leishman v. Associated Wholesale Elec. Company,* 318 U.S. 203. See, 9 Moore's Federal Practice §201.03[2-2], text accompanying footnotes 8 through 12. In *United States v. Crescent Amusement Company,* 323 U.S.173, the Court held that a direct appeal taken to this Court was premature where a motion to amend the district court's findings was pending at the time the notice was filed. The Court held further that notwithstanding the filing of the premature notice of appeal, the district court was not deprived of jurisdiction to pass upon the pending motion.

> "The motion to amend the findings tolled the time to appeal if it was not addressed to 'mere matters of form but raised questions of substance' e.g., if it sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.' Leishman v. Associated Wholesale Elec. Company, 318 U.S. 203, 205. . . . An examination of the motion makes plain that matters of substance were raised. The appeal in No. 17 was accordingly premature. [citation omitted] But it does not follow that the district court had no jurisdiction to allow the appeal in No. 18 [the appeal which followed the district court's ruling on the motion to amend its findings]. An appeal can hardly be premature (and therefore a nullity) here and yet not premature (and therefore binding) below." (323 U.S. at 177-178).

See also, *United States v. Healy,* 376 U.S.75; *United States v. Adams,* 383 U.S.39.

From all of the foregoing, it follows that the District Court clearly had jurisdiction to decide the post-judgment motions and to enter the amendment to judgment on September 30, 1974. Although only Appellants Gourley, Fontecchio, Hafdahl and Harrison filed Notice of Appeal to this Court from the amendment to judgment entered September 30, it would appear that the premature Notices of Appeal filed by Appellants Hicks, Sears and Younger should be treated as having been taken from the judgment as amended on September 30. See, *Ruby v. Secretary of United States Navy,* 365 F.2d 385, 389 (9 Cir. 1966).

II

The Appeal Herein Is Not Within the Jurisdiction of This Court Because the District Court's Judgment, as Amended, Grants Only Declaratory Relief Respecting the Constitutionality of State Statutes and, Although an Injunction Also Is Granted, the Injunction Does Not Restrain the Action of Any State Officer by Restraining the Enforcement, Operation or Execution of Any State Statute.

Under 28 U.S.C. §1253, an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C §2281 provides that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute . . . shall not be granted . . . upon the ground of the unconstitutionality of such stat-

ute unless the application therefor is heard and determined by a district court of three judges under §2284 of this Title."

It is not the mere grant or denial of any injunction by a three-judge court which permits a direct appeal to this Court, but rather the grant or denial of an injunction restraining enforcement of a state statute. *Board of Regents of University of Texas System v. New Left Ed. Project*, 404 U.S.541. It is submitted that the amendment to the judgment entered by the District Court on September 30, requiring Appellants to petition the state court to return to Appellees three of the four seized film prints, is not within the direct appeal jurisdiction of this Court because it is not an injunction restraining the enforcement, operation or execution of a state statute upon the ground of the unconstitutionality of such statute.

This Court has emphasized repeatedly that 28 U.S.C. §1253 is to be narrowly construed since loose construction would defeat the congressional purpose to keep within narrow confines the appellate docket of this Court. *Gonzalez v. Automatic Employees Credit Union*, 95 S.Ct.289; *Goldstein v. Cox*, 396 U.S.471, 478. The Court has stressed that the three-judge court legislation, including the provisions for direct appeal to this Court, is not "a measure of broad social policy to be construed with great liberality," but is rather "an enactment technical in the strict sense of the term and to be applied as such." *Mitchell v. Donovan*, 398 U.S. 427, 431. Pursuant to these principles it is firmly established that §1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone, but such appeal lies only with the Court of Appeals. *Gerstein v. Coe*, 94 S.Ct.2246; *Gunn v. University Committee*, 399 U.S.383; *Mitchell v. Donovan*, 398 U.S.427; *Rockefeller v. Catholic Medical Center, etc.*, 397 U.S.820; see also, *Roe v. Wade*, 410 U.S.113, 123.

Appellees sought declaratory relief only with respect to the constitutionality of the California obscenity statutes, and only a declaratory judgment was entered. Appellants concede the foregoing, but argue instead that the June 4 and September 30 orders respecting the return of seized prints are injunctions within the meaning of 28 U.S.C. §1253, relying upon the decision in *Perez v. Ledesma*, 401 U.S.82. In *Perez*, a three-judge court entered a judgment ordering the return of material seized on the ground of its alleged obscenity by state officials and further ordered the suppression as evidence of the seized property in a pending state criminal prosecution. Since all of the material seized was ordered returned and its use as evidence in the state prosecution suppressed, this Court viewed the injunction as "crippling Louisiana's ability to enforce its criminal statute against Ledesma," (401 U.S. at 85) and, accordingly, held the appeal to be within its jurisdiction under §1253. Indeed, the Court stated that:

> "It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings. Even the three-judge court recognized that its judgment would effectively stifle the then-pending state criminal prosecution." (401 U.S. at 84).

Appellants' reliance upon *Perez v. Ledesma* would be understandable if the original judgment entered June 4

had not been amended. The June 4 judgment originally had directed Appellants to return to Appellees all copies of the seized film. The return of all of the seized prints probably would have terminated the misdemeanor state prosecution concerning the exhibition of "Deep Throat" at Appellees' theatre. However, in the course of litigating Appellants' post-judgment motions, Appellees informed the District Court that they sought the return only of the excess prints that had been seized. (A. 94-95.) Accordingly, the District Court entered an amendment to the judgment on September 30, requiring Appellants to petition the state court to return to Appellees only three of the four seized film prints.[14]

The District Court had jurisdiction to enter the aforesaid amendment to the judgment on September 30, as demonstrated in Point I, *supra*. Since Appellants had stipulated that only one copy of the film was necessary for the trial of the state obscenity prosecution (A. 79), the order requiring the return of only three of the four seized films neither terminates, disrupts, nor even affects the state prosecution arising out of the exhibition of "Deep Throat" at Appellees' theatre. The judgment of the court below, as thus amended, is totally unlike the injunctive orders in *Perez v. Ledesma*.

Appellees' prayer for return of three of the four copies of "Deep Throat" seized from the theatre rests

[14]The direction to Appellants to petition in good faith the state court to return the property was the result of Appellants' contention made in their post-judgment motions that they had no power to return any of the seized films because they were in the custody of the State Municipal Court. (A. 120.)

upon a legal theory independent of the claim that the California obscenity statute is unconstitutional. Appellees contended in the court below that multiple seizures of the same film upon search warrants issued *ex parte*, violated the constitutional mandate of *Heller v. New York*, 413 U.S.483, in which this Court made it clear that the Constitution prohibits "seizing films to destroy them or to block their distribution or exhibition" (93 S.Ct. at 2794) where, as here, the multiple seizures occur prior to a judicial determination in an adversary proceeding that the material is obscene. (A. 32-34.) In other words, the District Court's declaration that the California obscenity statutes are unconstitutional is not an indispensable prerequisite to its order requiring the return of three of the four film prints seized.

At the time Appellees' Complaint was filed, the prayer for an injunction to return seized property had the potential of restraining state officials in the enforcement of the state obscenity statutes, as in *Perez v. Ledesma*. The Complaint thus was viewed properly as requiring the convening of a three-judge court. It was not until January 29, 1974, two months after the Complaint was filed, and one month after Judge Lydick requested the convening of a three-judge court (A. 5), that the prosecution and defense in the state obscenity prosecution stipulated that only one copy of the film would be required for the obscenity trial. (A. 129.) As a result of that stipulation, and the District Court's amendment to the judgment permitting Appellants to retain one copy of the film, the judgment of the court

below, as amended. simply does not have the effect of restraining state officials in the enforcement of the state obscenity statutes. For purposes of controlling this Court's direct appeal jurisdiction, this case is no different from those in which a properly convened three-judge court grants only declaratory relief with respect to the constitutionality of a state or federal statute. Appeal from the grant of such declaratory relief lies only with the Court of Appeals. See, *e.g., Gerstein v. Coe,* 94 S.Ct.2246; *Gunn v. University Committee,* 399 U.S. 383. Although the present appeal falls within the literal words of 28 U.S.C. §1253, this Court's interpretation of that legislation "has frequently deviated from the path of literalism." *Gonzalez v. Automatic Employees Credit Union,* 95 S.Ct.289, 293. Where, as here, a three-judge court grants only declaratory relief respecting the constitutionality of a state statute, and also grants an injunction to resolve fully the controversy between the parties, but which injunction does not restrain the enforcement, operation or execution of any state statute, the appeal should lie with the Court of Appeals in the first instance. As the Court has recently noted:

> "Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals." *Gonzalez v. Automatic Employees Credit Union,* 95 S.Ct.289, 295.

III

The Case Is Governed by the Principles Enunciated by the Court in Steffel v. Thompson. Pullman Abstention Was Inappropriate, and the District Court Correctly Found and Concluded That Determination on the Merits Was Not Barred by the Principles of Younger or Samuels. The Findings of the District Court of Official Lawlessness to Prevent the Exercise of First Amendment Rights Are Clearly Supported in the Record.

A. If the Court should proceed to a decision on the merits, it is submitted that the judgment of the District Court, as amended, was correct. Neither the doctrine of abstention, nor comity restraint, were applicable in the light of the facts which gave rise to the litigation.

There is no serious claim made by Appellants that *Pullman* abstention was required. The Complaint filed by Appellees in the federal court alleged, among other things, the multiple seizures of prints of a motion picture film in violation of the free speech and press provisions of the Constitution and the unconstitutionality of the state obscenity statutes in violation of the First and Fourteenth Amendments, as well as the interpretive decisions of this Court. (A. 15-17.) The validity of the state statutes was not determined by this Court in *Miller v. California,* 413 U.S.15. Instead, this Court held that, while a state obscenity statute might be invalid on its face under *Miller,* still the statute might not offend *Miller* if a prior authoritative construction included the *Miller* specificity. Following the decision in *Miller,* the California courts authoritatively construed

the California statutes and held that the *Miller* requirements had been met. *People v. Enskat,* 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), hearing denied by the California Supreme Court, October 24, 1973. Before the District Court, the Appellants here constantly asserted that *Enskat* was now the law in California, a view accepted by the District Court below. "Thus, any defense in state court that the statute is defective under the Federal Constitution would be precluded." (Appendix "A" to Jurisdictional Statement, p. 8.)

This Court has recently affirmed [*Kusper v. Pontikes,* 414 U.S.51] that the doctrine of abstention contemplates deference to state court adjudication only when the issue of state law is uncertain. On the other hand, where it can be fairly concluded that the state statute is not susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention amounts to an abdication of the responsibility of the federal courts to protect every right granted or secured by the Constitution of the United States. Federal courts have abstained only where applicable state law which would be dispositive of the controversy was unclear and where a state court interpretation of the state law question might obviate the necessity of deciding the federal constitutional issue. *Harman v. Forssenius,* 380 U.S.528, 534; *Zwickler v. Koota,* 389 U.S.241; *Gay v. Board of Registration Commissioners,* 466 F.2d 879 (6 Cir. 1972); *Hobbs v. Thompson,* 448 F.2d 456, 461-463 (5 Cir. 1971); *Detco, Inc. v. Breier,* 349 F.Supp. 537 (D.C. Wisc. 1972).

B. The Appellants attempt to distinguish *Steffel,* and place principal reliance on *Younger.* The decision of the Court in *Younger v. Harris,* 401 U.S.37,

however, does not appear to support Appellants, either on the law or the facts. In the first place, *Younger* presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. *Gibson v. Berryhill,* 411 U.S.564. Here, the predicate for a *Younger v. Harris* ruling was lacking because, in the light of the ruling in *Enskat* by the California courts, a journey through the state court system would be futile. Moreover, the Complaint here prayed solely for declaratory relief with respect to the validity of the state obscenity statute (A. 19), and an application for an order to show cause and temporary restraining order enjoining the criminal prosecution was denied by District Judge Ferguson after rendition of the judgment of the three-judge court as amended. (R. 332.) In addition, the Complaint, while seeking the return of the excess copies of the film seized from the theatre, at the same time agreed that the defendants should be permitted "to make and retain a single copy of the said film". (A. 19.) The Supplemental Opinion of the District Court, after noting the stipulation entered into in the criminal case by the prosecutor and defense counsel, that all four of the prints seized were identical, observed that Appellees' counsel honored the stipulation and did not oppose the state officials' retaining one copy of the film. (A. 129.) Thus, this is not a case involving the interruption or disruption of state proceedings, nor is it a case where the state proceedings offer a vehicle for vindicating the Appellees' constitutional rights. See, *Heller v. New York,* 413 U.S. 483; *Cinema Classics, Ltd. v. Busch,* 339 F.Supp. 43 (C.D. Cal. 1972), aff'd. 409 U.S.807.

C. In *Steffel v. Thompson,* 415 U.S.452, the Court held that when the constitutionality of a state criminal

statute is challenged in federal court, declaratory relief is appropriate if the plaintiff can demonstrate a genuine threat of enforcement and if state criminal proceedings are not pending at the time the federal suit is commenced. Distinguishing *Younger* and *Samuels,* the Court stated, in *Steffel,* that the relevant principles of equity, comity and federalism have little force in the absence of a pending state proceeding. When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. Accordingly, the District Court below was correct in holding:

> "The situation presents no danger of 'duplicative proceedings or disruption of the state criminal justice system,' *Steffel* at 9. The role of the federal court is unaffected, whether the attack is to the statute on its face or as applied, *Steffel* at 20-22. Here, the California statute is alleged to be facially invalid, but the decision in *Miller v. California, supra,* requires this court to pay due regard to the state judicial interpretation of the state [*sic*] as well. Finally, the fact that there may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief. *Steffel* at 18 n. 19. No barriers exist to prevent this court from examining the merits of plaintiff's claim." (Appendix "A" to Jurisdictional Statement, p. 9.)

See also, Supplemental Memorandum Opinion of September 30, 1974. (A. 122-123.)

The Appellants have sought to avoid the impact of *Steffel* by improvising two separate theories: the first,

that the state criminal proceedings were vicariously pending against Appellees because a complaint had previously been filed against the theatre employees; the second, that there was, in any event, a "pending" prosecution against Appellees when the criminal complaint was amended to include their names a day after the federal complaint was served upon Appellants, and more than six weeks after Appellants became aware that a federal complaint had been filed by Appellees. (A. 5.)

Both of these theories have little relevance in the case herein. Ordinarily, the effort of the state officials to halt the federal proceedings, and to relegate the federal plaintiff to state proceedings, is premised on the view that the constitutional validity of the state statute will be determined in the state proceedings, and that the needs of the federal plaintiff will therefore be answered. In this case, however, the state courts have authoritatively decided that the state statute is constitutional. Thus, the Appellees lack an adequate remedy in the state courts for vindication of their federal claims. The Appellees here cannot obtain an effective remedy or substantial justice in the state courts.

In the abstract, there is no sound reason why a federal plaintiff, who has no prosecution pending against him, should be denied a hearing by a federal court. To tell such a federal plaintiff that the constitutionality of the state statute eventually will be determined in the state proceedings does not appear sufficient. The federal plaintiff has no right to intervene in the pending state case and present his own arguments as to the constitutionality of the law involved. The defendant in the pending state case may not necessarily raise constitutional issues as part of his de-

fense; he may be acquitted on other grounds; or he may decide not to appeal his conviction. Denying relief to a federal plaintiff compels him to depend for vindication of rights on a proceeding over which he has no influence, or else to endure long delays until a conclusion of all state proceedings, so that he can then start his own federal suit. Moreover, as in the case herein, it is inaccurate to assert that the interests of the theatre employees and the interests of the Appellees are the same or similar. The Complaint states that the Appellee Miranda is the owner of the land where the theatre is located, and the Appellee Pussycat Theater Hollywood is a California corporation engaged in the business of operating a motion picture theatre on the same property. The interests of the owner of the property and the operator of the theatre are in many respects diverse from those of the theatre employees. The right of these Appellees not to be arbitrarily deprived of their liberties and properties without due process of law has a broader and more distinctive scope than those employed temporarily in the theatre. See, *Heller v. New York,* 413 U.S.483; *Lynch v. Household Finance Corp.,* 405 U.S.538.

The contention that a state action may be deemed "pending" if the federal plaintiff is arrested or indicted after the federal complaint is filed also appears untenable. Such an approach would provide a ready device for state prosecutors to remove from the federal to the state court the litigation of constitutional claims made by the federal plaintiff. Such a device could frustrate federal jurisdiction, penalize the plaintiff for having brought the federal action, or chill others from engaging in conduct which the state prosecutors question. If the filing of federal actions are quickly followed by

state prosecutions, potential plaintiffs would not bring declaratory actions for fear of prosecution, and the principles of *Steffel* could be violated. In *Steffel,* the Court stated that requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. To allow the State to force the same result and defeat the paramount role which Congress has assigned to the federal courts to protect constitutional rights would also have the same effect. Moreover, in the case herein, the District Court found "that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in ths court". (A.123.) The misdemeanor complaint was filed only against the theatre employees. When the Appellees here filed their complaint on November 29, 1973, in the United States District Court, they also at the same time requested a temporary restraining order which was opposed by appellants. At least six weeks before the amendment of the misdemeanor complaint to include these Appellees, Appellants already knew the federal complaint had been filed. The effort to deprive the federal court of jurisdiction was manifest. *Zwickler v. Koota,* 389 U.S.241; *Samuels v. Mackell,* 401 U.S.66, 73-74; *Steffel v. Thompson,* 415 U.S.452.

D. In the light of the foregoing, it is submitted that the District Court correctly held that the strict requirements of *Younger* were only of "tangential relevance" to the issues involved in the case. (A. 123.) Nevertheless, the record establishes that the prosecutors and police in this case employed a scheme of harassment in bad faith to discourage the exercise of First Amendment rights. The objective criteria for determining bad

faith official activity under the aegis of a challenged statute were abundantly satisfied. Moreover, not only was there proof of great irreparable harm from official lawlessness, but the case also presents the "extraordinary circumstances" in which the irreparable injury is shown. *Younger v. Harris,* 401 U.S.37, 53. As aforestated, in this case the state courts have upheld the challenged law, and therefore the likelihood of great and immediate irreparable injury could not have been eliminated in the criminal prosecution pending against the theatre employees.

The record in this case abundantly demonstrates that the prosecuting officials and the police entered into an agreement, tacit or otherwise, that the motion picture film would not be shown in the City of Buena Park, County of Orange, State of California. The repeated seizures of copies of the motion picture film infringed on the ability of Appellees to show the motion picture to a substantial number of customers. It was equivalent to multiplying the seizure by the number of seats available in the theatre on each day of the seizure. The objective of the officials was suppression; the means used to attain the unlawful objective were harassment and bad faith enforcement. These were the findings of the District Court, and such findings were clearly not erroneous. See, *Duncan v. Perez,* 445 F.2d 557 (5 Cir. 1971), cert. den. 404 U.S.940; *Krahm v. Graham,* 461 F.2d 703 (9 Cir. 1972); *Shaw v. Garrison,* 467 F.2d 113 (5 Cir. 1972), cert. den. 409 U.S.1024; *McGuire v. Roebuck,* 347 F.Supp. 1111 (D.C. Tex. 1972); *Montgomery County Board of Education v. Shelton,* 327 F.Supp. 811 (D.C. Miss. 1971).

In *Heller v. New York,* 413 U.S.483, 93 S.Ct.2789, 2793-2794, the Court held that the film in that case

"was not subjected to any form of 'final restraint', in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence.* There has been no showing that the seizure of a copy of the film precluded its continued exhibition". The Court added that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, . . ." (Court's emphasis). The Court emphasized in *Heller* that repeated seizures of films to prevent their exhibition adversely affected First Amendment interests. Moreover, in *Roaden v. Kentucky,* 413 U.S.496, 93 S.Ct.2796, 2801, the Court observed that seizures of films may be "unreasonable" under the Fourth Amendment because "prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the book store or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression".

Here, there were initially four multiple seizures of the single film within two days after the theatre began to exhibit the film. (Appendix "A" to Jurisdictional Statement, pp. 1-5.) Each seizure was accompanied by the seizure of cash receipts at the theatre. On June 4, 1974, the District Court entered its judgment requiring the return of the seized property to the appellees. (Appendix "A" to Jurisdictional Statement, p. 21.) Thereafter, appellants seized seven additional copies of

the same motion picture film. [Findings of Fact and Conclusions of Law, September 5, 1974, Appendix "B" hereto.] Appellants cannot claim that these seizures were lawful in the light of the principles enunciated in *Heller, Roaden, Marcus* and *One Quantity of Books.* The claim that the copies of the film were "different" was patently unfounded, and the three-judge District Court so found in its initial ruling and in its supplemental opinion. (Appendix "A" to Jurisdictional Statement, pp. 1-5; A. 129.) On January 29, 1974, the prosecutor stipulated that the four copies seized were in all respects identical. (A. 75-79.) The repeated use of a single form in the various affidavits in support of the search warrants, which spoke of an "additional act of sexual intercourse" and "numerous small changes at different portions of the film" (Appendix "A" to Jurisdictional Statement, pp. 3-4), was a plain subterfuge by the appellants to circumvent the rulings in *Heller* and *Roaden.* If there were any "small changes", they were never particularized, nor was there ever any statement of how much additional time was consumed in these alleged differences or whether the officers merely saw additional details in their repeated viewing of the same film.

California Penal Code §1538.5 is the principal statute governing motions for return of property or suppression as evidence on the grounds of an illegal search and seizure. The statute specifically provides that if the property or evidence relates to a misdemeanor complaint, the motion shall be made in the Municipal Court before trial. §1538.5(g). Both the People and the defendant have a right to appeal any decision of the Municipal Court relating to the motion for return or suppression to the Superior Court of the County in which

the Municipal Court is located. Aside from appellate review of orders granting or denying motions for return or suppression, the Superior Court has no jurisdiction in search and seizure proceedings involved in misdemeanor prosecutions. The motion for return or suppression is heard by the magistrate who issued the search warrant. §1538.5(b). When an officer takes property under a search warrant, all property or things seized must be retained by the officer in his custody. California Penal Code §1536. In California the seizure of alleged obscene material under a search warrant must be followed immediately by an adversary proceeding to justify the seizure. The issue of obscenity is not presented in such adversary proceedings. The only issue is whether there existed probable cause for the issuance of the search warrant. "It should be emphasized that in applying these principles here we are concerned only with probable cause, not with the final determination as to the character of the named books or the guilt of petitioners." *Aday v. Superior Court,* 55 Cal.2d 789, 362 P.2d 147, 13 Cal.Rptr. 415, 421; *Aday v. Municipal Court,* 210 Cal.App.2d 229, 26 Cal.Rptr. 576. See, *Blount v. Rizzi,* 400 U.S.410, 420. The legislature of the State of California has chosen only one method for the determination of the alleged obscenity of material, and that is in criminal proceedings before a jury. California Penal Code §§311-313.5. Only upon the conviction of an accused, and only when a conviction becomes final, can obscene material in the possession of law enforcement officials or the court be suppressed or destroyed. California Penal Code §312.

In the case herein, official lawlessness is made manifest by the disregard of state statutory provisions and by the circumvention of governing law through the im-

provisation of unauthorized proceedings denominated with the talismanic label of "adversary proceedings", which were in actuality injunctive prior restraints authorizing the suppression of all copies of a motion picture film. The actions of the officials were not only lawless, but a deliberate attempt to circumvent the principles enunciated in *Marcus v. Search Warrants, One Quantity of Books v. Kansas, Heller v. New York,* and *Roaden v. Kentucky*. Application for search warrants were made to a Judge of the Municipal Court of a judicial district other than the judicial district in which the theatre is located. Contrary to law, the seized property was turned over to the Judge at his home, the obvious purpose being to frustrate any order of the federal court directing return of the seized copies of the film. (A. 37, 41, 129-130.) Instead of proceeding in the Municipal Court, the Appellants here obtained an order from a Judge of the Superior Court restraining any further exhibition of the motion picture film pending hearing on an order to show cause why all of the copies of the film should not be ordered seized as contraband. (A. 64-65.) At the time this restraining order was obtained, the Superior Court Judge had not even seen the film. (A. 73.) Thus, the proceedings before the Superior Court were not an "adversary proceeding" seeking to justify the prior seizure of the four copies of the film. On the contrary, this was an improvised procedure commencing with a prior restraint and seeking to suppress all copies of the film in the future. No provision in law exists for such a procedure. No complaint was ever filed and no action was ever commenced. Nevertheless, the Judge of the Superior Court proceeded to have a so-called hearing and pronounced the film obscene "beyond any reasonable doubt". There was palpably no jurisdiction in the Court to make any such determination. The colloquy before the Superior Court Judge clearly establishes that the sole intent of the proceedings was to evade governing law and to suppress the motion picture film. (A. 68-74.) As counsel for Appellees correctly stated:

> "The People have filed a criminal prosecution; that is their remedy under the laws of the State of California, there is no corresponding civil remedy to enjoin the exhibition of the film to seize all copies of the film or to declare it obscene. . . .
>
> "Now, all I have before me is an Order to Show Cause without a proceeding; there is not even a complaint, not even a complaint [on] file in the Superior Court.
>
> "Now, where does the Superior Court have jurisdiction to enter a temporary restraining order where there is not even a case pending before the Superior Court?" (A. 68-69.)[15]

The findings and conclusions of the District Court were based upon a record which unmistakably demonstrated an intentional plan of harassment by prosecuting officials and police officers for the purpose of denying Appellees' First Amendment rights. Harassment and bad faith enforcement and the resultant great ir-

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[15]The State has rejected attempts to vest jurisdiction in the Superior Court to entertain actions seeking injunctions against the sale or distribution of books, magazines, motion picture films, or any other articles alleged to be obscene. A proposed initiative measure was rejected in 1972. (A copy of the proposed initiative measure is contained as Appendix B to the Supplemental Memorandum of Points and Authorities in Support of Temporary Restraining Order and Order to Show Cause filed December 3, 1973). (R. 137.) Subsequent attempts in the state legislature to vest such jurisdiction in the Superior Court have all failed.

reparable harm were plainly established. Moreover, this is not a case of balancing the importance of the claims to federal court protection of constitutional rights against the interest of the State in being the decider in the first instance. In this case the state courts had made their determination with respect to the constitutionality of the statute, and it was thus plain that Appellees could not obtain adequate protection in state proceedings.

E. Two briefs have been submitted on behalf of Appellants, the first on behalf of the District Attorney of the County of Orange, and the other on behalf of the Attorney General of the State. On the issues of abstention and comity, most of the arguments advanced by the Appellants have been answered in the foregoing discussion. The District Attorney's brief (pp. 34-45) relies on the theory of "imputing" the existence of state criminal proceedings to these Appellees on the basis of the prior criminal prosecution instituted against the theatre employees, and in the alternative, that the subsequent amendment of the criminal proceedings to include the Appellees also resulted in a "pending" prosecution which deprived the federal court of jurisdiction. Principal reliance is placed upon *Allee v. Madrano,* 94 S.Ct.2191. The District Court below, referring to the opinion of Chief Justice Burger in *Allee,* pointed to the fact that the Chief Justice stated "that inferences of bad faith can arise from the common activity of the prosecutors and the police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction". (A. 122-123.) The District Court held that the later criminal charges brought in the case herein were added justification for action by the District Court. The District Court concluded "that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court". (A. 123.)

The District Attorney (Br., pp. 53-66) attempts to invoke *Younger* and *Perez,* contending that there was an "absence of harassment". The Appellants do not dispute the stipulation made in the criminal proceedings that the four copies of the motion picture film were identical. There is no question that the record shows that they were so treated in actuality by the Appellants. The Appellants concede that "it is true" (Br., p. 54) that an *ex parte* restraining order was obtained against further showing of the film. Stress is placed upon the term "adversary proceeding", but there is not the slightest substantiation for the contention that the proceedings in the Superior Court had any support in law. It is urged that a jury trial is not necessarily required in an obscenity prosecution, but this contention is irrelevant in the context of the case herein. Appellees' point is that there were repeated seizures in violation of *Heller;* prior restraining orders obtained *ex parte* by a judge who had no jurisdiction and who had never seen the film; followed by seven more seizures of copies of the same film. The argument that the District Court lacked jurisdiction because the complaint sought "recovery of property in the custody of a state court" (pp. 67-68) is without merit under both state and federal law. See, California Penal Code §1536; *Cinema Classics, Ltd. v. Busch,* 339 F.Supp. 43 (C.D. Cal. 1974), aff'd. 409 U.S. 807.

The cases cited by the District Attorney (Br., p. 55) were all decided before *Heller v. New York.* They are

random decisions where the factual circumstances are in no way akin to those presented in the record here. They involve cases dealing with burglary, contempt proceedings, searches in homes, malicious mischief, habeas corpus proceedings involving detainers of prisoners, coercions by officials of a plea of guilty, and other like proceedings. The decision in *Wilhelm v. Turner,* 298 F.Supp. 1335, affirmed 431 F.2d 177, cert. den. 401 U.S.947, does not aid Appellants, either on the law or the facts. The case here does not involve the issue of official immunity in damage actions brought under the Civil Rights Act. This is a case of repeated seizures of copies of a single motion picture film, in violation of the First and Fourteenth Amendments, and the intentional suppression of the exhibition of the motion picture film under procedures unauthorized by state law, in violation of federal law, and in violation of the federal Constitution.

The Attorney General's brief argues for abstention (pp. 21-33) on similar grounds. In an attempt to create a "pending" prosecution prior to the filing of the federal complaint, the brief argues that the improvised procedure in the Superior Court was akin to a criminal prosecution, on the theory that such proceeding is of "a quasi-criminal nature, intended as an equitable remedy against criminal conduct". No attempt is made to support the legality of these procedures, and it should be noted that the two cases relied upon by the Attorney General in this connection involved state proceedings authorized by statute. See, *Maseo v. Cannon,* 326 F.Supp. 1315 (D.C. Wis. 1971); *McCue v. City of Racine,* 330 F.Supp. 466 (D.C. Wis. 1971). (Br., pp. 23-24.) The contention that the proceeding before the Superior Court was somehow a "quasi-criminal"

procedure is without merit. The brief argues, contrary to the argument that was made by Appellants before the District Court (Appendix "A" to Jurisdictional Statement, p. 8), that *Enskat* does not necessarily represent the settled law in California (pp. 24-25). In the light of the denial of hearing in *Enskat* by the California Supreme Court and the subsequent proceedings, it is submitted that this argument ignores reality. The District Court rightly observed, and indeed the Appellants argued before the District Court, that the California decisions make it clear that the judgment rendered by the Court of Appeal in *Enskat* is binding upon all of the Superior and Municipal Courts of the State. Denial of hearing by the California Supreme Court stands as a decision of a court of last resort in California until and unless disapproved by the California Supreme Court or until change of the law by legislative action. (Appendix "A" to Jurisdictional Statement, p. 8.)

In attempting to urge the argument that the state prosecution was "pending" because of the alleged "identity of interest" between the theatre employees and Appellees, the Attorney General reveals an anomalous position. It is argued that since the films which were seized and which were the object of the criminal prosecution against the theatre employees were subject to the provisions of California Penal Code §312, to wit, that "upon the conviction of the accused, the court may, when the conviction becomes final", order the material in the possession or control of the District Attorney or any law enforcement agency to be destroyed, it follows that the Appellees' ownership of the films "involved them in the ongoing state criminal action", and that the direction to return the three copies of the

film constituted an "unwarranted intrusion and intervention in a valid ongoing state prosecution". (Br., pp. 25-27.) While conceding that it was true that a stipulation had been agreed to that all of the seized copies were identical, still it is urged that once returned to appellees, the other copies of the film "would be beyond the reach of the state court". (Br., p. 28.)

The aforesaid arguments are not only contradictory, but they reveal the basis for the findings and conclusions of the District Court. There is no attempt made to justify the state proceedings; yet these proceedings are urged as a device for depriving the said court of federal jurisdiction. It is conceded that the only existing legislation requires the institution of criminal proceedings, with the sole justification for suppression only following conviction and final affirmance of such conviction. It is conceded that the State will at all times have possession of a copy of the film to support the criminal prosecution, and yet it is urged that *Heller* and the First Amendment should be disregarded because if a conviction is obtained and finally affirmed, the additional copies may not be available for destruction.

The arguments by the Attorney General with respect to the "race to the courthouse" (pp. 30-31) have been previously anwered. The brief attempts to impale Appellees on the horns of a dilemma; there is, however, a third way out. It is urged that if the authorities determined not to prosecute Appellees, then Appellees would lack standing. However, the authorities did decide to prosecute, and standing cannot now be denied. It is then urged that if the state authorities initiate prosecution, Appellees "would be presented with a state court forum which justifies abstention" (Br., p. 30.) However, as has heretofore been demonstrated, the state forum was no longer available to vindicate Appellees' constitutional rights, and abstention was therefore not justified. Reliance upon the initial order of Judge Lydick is misplaced. This was merely an application initially made for a temporary restraining order by Appellees. Judge Lydick did not have the benefit of subsequent evidence before the three-judge court which demonstrated that the films were not different but were, in fact, identical, both by stipulation and by the treatment of the films by the Appellants.

IV

The District Court Correctly Held That the California Obscenity Statute, as Interpreted by the State Courts of California, Fails to Meet the Constitutional Standards Mandated by the Court in Miller v. California, 413 U.S.15.

A. In *Miller v. California,* 413 U.S.15, this Court sought to reduce the admitted chaos permeating the law of obscenity. The Court spoke of "the intractable obscenity problem" and quoted Justice Harlan's observation in *Interstate Circuit, Inc. v. Dallas,* 390 U.S.676, 704-705, that the law of obscenity had brought forth "a variety of views among members of the Court unmatched in any other course of constitutional adjudication [footnote omitted]." In *Miller,* the Court recognized what everyone connected with obscenity law had known for years—that under the original formulation of *Roth v. United States,* 354 U.S.476, and the "three-pronged" plurality approach of *Memoirs v. Massachusetts,* 383 U.S.413, it had been impossible to know with any adequate degree of certainty whether publications dealing with sex would be afforded constitu-

tional protection under the First Amendment or condemned as obscene. In view of the acknowledged unworkability of the *Roth-Memoirs* test, the Court was forced to adopt the "casual practice" of *Redrup v. New York,* 386 U.S.767. As Chief Justice Burger stated:

> "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York,* 386 U.S.767 . . . Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy'. See *Walker v. Ohio,* 398 U.S. 434, 435 . . . (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California,* 413 U.S. at 22, n.3.

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S.49, 82, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York,* 386 U.S.767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court

> "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (413 U.S. at 83.)

In *Miller,* the Court concluded that a continuance of this condition, of extreme vagueness in the line separating protected from unprotected speech, was constitutionally intolerable because of the lack of fair notice to those who produce and circulate sexually related publications, and the absence of concrete guidelines for prosecutors and courts.

The explicit premise of the revised test which the Court adopted in *Miller* was that this new test—unlike *Roth, Memoirs* and *Redrup*—would bring about clarity in obscenity law.

In *Miller,* the Court stated that "in the area of freedom of speech and press the courts must always remain sensitive," (413 U.S. at 22-23), and acknowledged "the inherent danger of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas,* 390 U.S.676, 682-685." (413 U.S. at 23-24.) In *Interstate Circuit,* the Court discussed with approval *Winters v. New York,* 333 U.S.507, where the Court struck down as vague and

indefinite a standard pursuant to which publications were condemned if they contained "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes." In *Interstate Circuit,* the Court also cited with approval *Burstyn v. Wilson,* 343 U.S.495; *Gelling v. Texas,* 343 U.S.960; *Superior Films, Inc. v. Dept. of Education,* 346 U.S.587; *Commercial Pictures Corp. v. Regents,* 346 U.S.587; *Holmby Productions, Inc. v. Vaughn,* 350 U.S.870; and *Kingsley Int'l. Pic. Corp. v. Regents,* 360 U.S.684. These cases had condemned as unconstitutionally vague the following standards:

> "Sacrilegious," which was found to have such an all-inclusive definition as to result in "substantially unbridled censorship."
>
> "Of such character as to be prejudicial to the best interest of the people of the city."
>
> "Morally educational, or amusing and harmless."
>
> "Immoral" and "tend to corrupt morals."
>
> "Approve such films . . . [as] are moral and proper; . . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals."
>
> "Unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime . . ."

In *Interstate Circuit,* the Court approved Justice Clark's concurring remarks in *Kingsley Int'l. Pic. Corp. v. Regents,* 360 U.S. at 701, where he stated:

> "The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law. . . ."

In an attempt to make the obscenity laws more precise, *Miller* held that statutes designed to regulate obscene materials must be confined to works which depict or describe sexual conduct specifically defined by the applicable state law as written or authoritatively construed. (413 U.S. at 23-24.)

Subsequently, the Court said that under

> "the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice." (413 U.S. at 27).

Addressing himself to this specificity requirement, Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S.49, stated that when an obscenity statute failed to contain the required descriptions of prohibited sexual conduct the statute could not stand.

> "For under the Court's restatements, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms

of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults." (413 U.S. at 95, n.13).

Chief Justice Burger recognized the force of Justice Brennan's views but did not think that *all* States other than Oregon would have to enact new obscenity statutes. "Other existing state statutes, as construed heretofore or hereafter may well be adequate." (413 U.S. at 24, n. 6). In discussing the kind of statute he had in mind, the Chief Justice pointed to Oregon and Hawaii statutes "as examples of state laws directed at depiction of defined physical conduct, as opposed to expression." (*Id.*)

B. In California, the Legislature has specifically defined obscenity, using the *Roth-Memoirs* test—a test this Court discarded as "unworkable." In *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800, the California Supreme Court traced the legislative history of California's "utterly without redeeming social value" test and concluded that it was essentially the equivalent of the "hard core pornography" test.[16] "By employing the term 'utterly', the Legislature indicated its intention to give legal sanction to all material relating to sex

[16]In *Redrup v. New York*, 386 U.S.767, 770, the Court stated that the "hard core pornography" test is similar to the *Memoirs* "utterly without redeeming social value" test.

except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard core pornography." (59 Cal.2d at 920, 31 Cal.Rptr. at 812-813) (Emphasis in original). Even as *Zeitlin* spoke of hard core pornography, it recognized the difficulty of "identifying and delimiting" that elusive concept. "[W]e are in an area where the recourse to verbal descriptions is ultrahazardous." (59 Cal.2d at 918, 31 Cal.Rptr. at 811, n.25.)

After the *Miller* decision, the California Court of Appeal in *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (hearing denied October 23, 1973, cert. den. 94 S.Ct.3225 [July 25, 1974]), examined the California obscenity statute to see if it met the constitutional standards required by the First and Fourteenth Amendments. *Enskat* recognized, of course, that the California statute defines obscenity in *Roth-Memoirs* language and does not contain specifically enumerated forms of sexual conduct, the depiction of which may be prohibited as obscene. *Enskat* made no attempt to read specific sexual conduct into the California statute, observing that, in California, that was a legislative, rather than a judicial, function. 33 Cal.App.3d at 901, 109 Cal.Rptr. at 440. *Enskat* cited with approval *In re M*, 9 Cal.3d 517, 520, 108 Cal.Rptr. 89, 92, where the California Supreme Court stated that courts may not "invade the province of the Legislature by redefining the elements of the underlying crime." *Enskat* also cited with approval *In re Brown*, 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 472 (1973), where the California

Supreme Court stated "In California all crimes are statutory. . . . Only the Legislature and not the courts may make conduct criminal." See also, *In re Lynch*, 8 Cal.3d 410, 414, 105 Cal.Rptr. 217, 219 (1972), where the California Supreme Court said:

> "We approach this issue with full awareness and respect for the distinct roles of the Legislature and the courts. . . . We recognize that in our tripartite system of government it is the function of the legislative branch to define crimes . . . and that such questions are in the first instance for the judgment of the Legislature alone."

Because *Enskat* recognized that California courts are not free to engage in judicial legislation, it turned to pre-*Miller* California decisions to see if those cases had given the California obscenity statute the requisite specificity mandated by *Miller*.

> "[W]e pause but briefly with appellant's contention that §311 has not been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. The contention is incorrect. . . . *Miller* states that [the sexual conduct] must be 'specifically defined by the applicable state law.' Previous California cases have so limited section 311. Thus it is clear that section 311 prohibits only 'hard core pornography' (Zeitlin v. Arnebergh, 59 C.2d 901, 31 Cal.Rptr. 800), that nudity does not equate with obscenity and that 'no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscenity' (People v. Noroff, 67 Cal. 2d 791 at 797, 63 Cal.Rptr. 575 at 579) and that 'To constitute obscenity . . . the material must contain a graphic description of sexual activity'

> (People v. Cimber, 271 C.A.2d Sup. 867, 869, 76 Cal.Rptr. 282, 283). Further . . . Landau v. Fording, 245 C.A.2d 520, 54 Cal.Rptr. 177, states with reference to a film depicting . . . fellatio, sodomy and oral copulation that 'It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. . .' (245 C.A. 2d at 826, 54 Cal.Rptr. at 181)." (Footnotes omitted) (33 C.A.3d at 909, 910, 109 Cal.Rptr. at 438-439).

Enskat impliedly recognized that the cases it cited did not give the statute the requisite specificity. It concluded, however, that California law required less concreteness than that called for in *Miller* because California retained the *Memoirs* "utterly without redeeming social value" test. *Enskat* concluded that it was only because this Court eliminated the *Memoirs* value test that it enunciated the new specificity standards. "[L]anguage in *Miller* itself indicates that the intent of the Court was only to require increased specificity in the state laws if the 'utterly without redeeming social value' test was abandoned." (33 Cal.App.3d at 911, 109 Cal.Rptr. at 440.)

C. The District Court did not consider the validity of the California obscenity statute until after it gave the California courts full opportunity to test its statute against the federal constitutional requirements this Court announced in *Miller*. Only after the California courts found that the statute as authoritatively construed did not violate the Constitution did the District Court exercise its constitutional duty and examine the statute to

determine whether it violated the guarantees of the First and Fourteenth Amendments.

The District Court interpreted *Miller* as this Court's first attempt to adopt a Due Process fair notice rule in the "long struggle to define that obscenity which is outside the protection of the First Amendment." (Appendix "A" to Jurisdictional Statement, p. 10.) The District Court below stated that *Enskat* "impliedly conceded that the statute as written does not meet *Miller*" but thought "that the statute [had] been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct." (Appendix "A" to Jurisdictional Statement, p. 11.) After noting the four cases *Enskat* relied on to find the requisite authoritative construction (*Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963); *People v. Noroyt*, 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967); *People v. Cimber*, 271 Cal.App.2d Sup. 867, 76 Cal.Rptr. 382 (1969); and *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal.Rptr. 177 (1966)), the District Court stated:

> "The analysis of those cases that emerges in *Enskat* is that: (1) only 'hard core pornography is prohibited' (2) nudity, absent a sexual activity is not obscenity; and (3) the material must contain a 'graphic' description of sexual activity." (Appendix "A" to Jurisdictional Statement, p. 12.)

The District Court below concluded that none of the state court opinions attempted to delineate standards of obscenity based on specific conduct and held that the statute as authoritatively construed clearly failed to meet the "fair notice" and "concrete guidelines" tests of *Miller*. The District Court stated that the "hard core pornography" test relied on in *Enskat* is no more precise than the term "obscenity". (Appendix "A" to

Jurisdictional Statement, p. 12.) The Court referred to *Jacobellis v. Ohio*, 378 U.S.184, 201, where Chief Justice Warren stated:

> "We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define 'obscenity.'"

In *United States v. Alexander*, 428 F.2d 1169 (8 Cir. 1970), the Court of Appeals rejected the argument of the Government that an adversary proceeding prior to seizure was not required "where the publications or films are patently obscene or 'hard core pornography.'" (428 F.2d at 1174). Quoting from the Supreme Court's decision in *Marcus v. Search Warrants of Property*, 367 U.S.717, the Court declined to accept a line drawn by the Government between "hard core pornography" and protected speech as being any brighter than "that between mere obscenity and protected speech" (428 F.2d at 1174). The Court of Appeals stated that "the assumption that there is a consensus among reasonable men as to the identity of 'hard core pornography,' therefore diminishing the danger of suppressing protected speech, may be questioned." (428 F.2d at 1174, n.7). In *Haldeman v. United States*, 340 F.2d 59, 62, n.6 (10 Cir. 1965), Judge Pickett, referring to the term "hard core pornography," stated:

> "The writer of this opinion . . . felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters."

In *People v. Adler*, 25 Cal.App.3d Sup. 24, 42, 101 Cal.Rptr. 726, 738 (1972), Judge Goldberg, dissenting, said:

> "[T]he expression 'hard core pornography' is as elusive as 'obscenity'. . . . [I]n United States v. West Coast News Co. (6 Cir. 1966), 357 F.2d 855, 858, the court reviewed a collection of trash similar to that confronting us and upheld the conviction, saying: 'We know hard core pornography when we see it.' In one of its three-line *per curiam* opinions that became commonplace in obscenity cases the Supreme Court said simply, 'reversed. Redrup v. New York . . .' Aday v. United States, 388 U.S. 447. It may be that 'hard core pornography' is no more than a 'personal obscenity divining rod.'"

In *Commonwealth v. Horton*, 310 N.E.2d 316, 324 (Mass. 1974) Justice Hennessey, concurring in the judgment of the Supreme Judicial Court of Massachusetts, striking down the Massachusetts obscenity law in light of *Miller*, stated that the phrase hard core pornography "is little more than a cliché which has not been defined in any case" and is insufficient to meet the specificity requirement.

That "hard core pornography" is as elusive a concept as "obscenity" is illustrated by the fact that the book "Tropic of Cancer" was found to be hard core pornography in New York (*People v. Fritch*, 13 N.Y. 2d 119, 192 N.E.2d 713 (1963), while California found that it was not hard core pornography (*Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963).)

In addition to finding the "cliché" hard core pornography imprecise, the District Court also found that

the phrase "graphic description of sexual activity" relied on in *Enskat* does not meet the specificity test. The court found this general language to fall far short of what it understood this Court to mean when it stated in *Miller* that "We now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller*, the District Court said, required specifically defined sexual conduct in the governing statute to comport with due process and to afford persons subject to the criminal obscenity statutes fair notice of what conduct is criminally proscribed. The court found that *Enskat*, and the cases cited therein, and other California cases brought to the court's attention, made no attempt "to formulate a standard of obscenity or a rule of law based upon those specific acts therein mentioned, or upon *any* specific acts." (Appendix "A" to Jurisdictional Statement, p. 13.) The court stated it was clear "that there can be 'sexual activity' which is utterly without redeeming social value which is so innocuous as to not be included on a list enumerated by a legislature. (Appendix "A" to Jurisdictional Statement, p. 14.)

The District Court also found constitutionally impermissible the argument made in *Enskat* that the retention in the California obscenity statute of the "utterly without redeeming social value" test dispensed with the due process specificity requirement set forth in *Miller*. The court found this argument to be "of questionable logic," and "particularly specious."

It should be remembered that in *Miller*, this Court stated: "We also reject as a constitutional standard the *ambiguous concept* of 'social importance.'" (413 U.S.

at 25, n.7.) (Emphasis added.) In *Miller*, the Court also wondered "if the 'utterly without redeeming social value' test had any meaning at all." (93 S.Ct. at 2613.) It is difficult to conceive how the "ambiguous" and "meaningless" "utterly without redeeming social value" test gives the necessary concreteness to the statute, if it otherwise fails to meet the *Miller* specificity requirement.

In holding the California statute unconstitutional, the District Court relied on a number of cases which had reached a similar result. (Appendix "A" to Jurisdictional Statement, n.2.) In *Commonwealth v. Horton*, 310 N.E.2d 316 (Mass. 1974), the Supreme Judicial Court of Massachusetts held that the Massachusetts obscenity statute failed to meet the *Miller* specificity requirement, and that its prior obscenity decisions had not authoritatively construed the statute in a way which has specifically defined the sexual conduct whose portrayal is barred by statute. "Our decisions . . . fall far short of the 'plain examples' given in the *Miller* opinion. . . . The most we have ever said was said in a negative way in a rescript opinion complying with what we viewed as the requirements of the Supreme Court of the United States. See *Commonwealth v. Donahue*, 358 Mass. 803 (1970) ("[n]one of the pictures, however, explicitly portrayed copulation or other sexual congress"). . . . The opinion in the *Donahue* case was not designed as an authoritative construction of our statute . . . so as to provide a definition of proscribed sexual conduct. The Court of Appeals for the First Circuit was correct in indicating in *Literature, Inc. v. Quinn*, 482 F.2d 372, 375 (1973), that this Court has not 'specifically defined' . . . those activities which under [the Massachusetts obscenity statute] may

not be depicted or described. It is therefore clear that the opportunity is not fairly available to us, as it was in certain other states . . . to conclude that the constitutional requirements of specificity have been met by our decisions previous to the *Miller* decision." (310 N.E.2d at 321.)

In *Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1973), the Louisiana Supreme Court found that the statute on its face did not comply with *Miller* and that the prior authoritative construction was not sufficient to bring it into compliance with *Miller*.

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . We are not of the opinion that we are endowed with the constitutional authority to redraft Louisiana's obscenity statute. . . ." (287 So.2d at 468-469.)

In *Hamar Theatres, Inc. v. Cryan*, 365 F.Supp. 1312 (D.C. N.J. 1973), a three-judge court found the New Jersey statute unconstitutional in light of *Miller*. Thereafter, this Court noted probable jurisdiction. *Cryan v. Hamar Theatres, Inc.*, 94 S.Ct.1967 (April 22, 1974). On December 23, 1974, the case was vacated and remanded to the United States District Court for the District of New Jersey to determine whether the cause was

moot in light of *State v. De Santis,* 65 N.J. 462 (1974). 43 L.W. 3354.

In *State v. De Santis,* 65 N.J. 462, 323 A.2d 489 (1974), the New Jersey Supreme Court held that the statute on its face and as it was construed prior to *Miller* was unconstitutional. For the future, however, the New Jersey Supreme Court did what the California courts refuse to do, *i.e.*, gave it a saving construction. The New Jersey Court found that the statute "satisfied *Memoirs* but did not meet the specificity requirements of *Miller;* nor did our judicial precedents satisfy *Miller's* demand that the prohibited hard core sexual conduct be 'specifically defined by the applicable state law, as written or authoritatively construed.' " (323 A.2d at 494.) The court noted that its prior obscenity decisions had "consistently avoided . . . particularization in favor of more general prohibitory standards. [Citations omitted]." Finding that the statute as written "does not in literal terms satisfy *Miller,*" and that its prior construction of the statute failed to give it a saving authoritative construction, the court concluded that the statute "cannot withstand constitutional attack unless we now judicially salvage it by incorporating the *Miller* requirements." (323 A.2d at 494.)

See also, *New Hampshire v. Harding,* 320 A.2d 646 (1974); *State v. Welke,* 213 N.W.2d 641 (1974).

D. The Attorney General, relying on the statement in *Miller* that the Constitution does not require "God-like precision," argues that it is "unnecessary that to avert the constitutional infirmity of vagueness the statute must recite a detailed 'blueprint' of the proscribed conduct." (Br. p. 18.) It is the Attorney General's submission "that *Miller's* demand for specificity does

not require a detailed statutory enumeration and description of *all* of the types of sexual activity sought to be proscribed as obscene." *Id.*

The Attorney General, follows *Enskat* and construes the statute as reaching only "hard core pornography", *i.e.*, "graphic depictions of sexual activity" or "nudity with sexual activity" (Br. pp. 17-18.) So construed, the statute does not enumerate *any* specific form of sexual conduct, the depiction of which may be prohibited and does not specify whether the prohibited "sexual activity" prohibited includes or excludes simulated acts.

The District Attorney views the statute differently. As he sees it, the sexual conduct covered by the statute is limited to actual, and not simulated, acts of "sexual intercourse, masturbation, sodomy, bestiality, sadism, masochism and oral copulation." (Br., p. 74.) The acts must be "ultimate sexual acts" which "lead to a culmination, that is, to orgasm" (Br., p. 71.)

The disagreement between the Attorney General and the District Attorney as to the correct meaning of the statute stems from the fact that the statute as written is plainly unconstitutional under *Miller,* and the judicial construction is lacking in "concrete guidelines". As previously noted, *Enskat* and the cases it relied on spoke only in generalities. Those cases did not purport to enumerate a list of sexual acts the depiction of which is within the statute. The question involved in the two California Supreme Court cases cited by *Enskat* [*Zeitlin v. Arnebergh,* 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963); and *People v. Noroff,* 67 Cal.2d 791, 63 Cal. Rptr. 575 (1967)] was whether the publications involved in those cases came within the restrictive limitations of the *Roth-Memoirs* test, which was incorporated

into the California obscenity statute. In each instance, the California Supreme Court found the publication not obscene. In *Zeitlin,* the court held that the book *Tropic of Cancer* was not "hard core pornography", without defining hard core pornography. In *Noroff*, the court found that the magazine did not contain "graphic depictions of sexual activity," without defining the terms "graphic depictions" or "sexual activity." In *Landau v. Fording*, 245 Cal.App.2d 520, 54 Cal.Rptr. 177, aff'd. 388 U.S.456 (1967), the homosexual activity found offensive consisted of suggested sexual acts "meaningfully omitted and thus by the very fact of omission emphasized". 54 Cal.Rptr. at 182. In *People v. Cimber,* 271 Cal.App.2d Supp. 867, 869, 76 Cal.Rptr. 382, 383 (1969), the court stated that the portrayal of sexual acts may be obscene although they are simulated rather than real. In *People v. Rosakos,* 268 Cal.App.2d 497, 74 Cal.Rptr. 34 (1968), a case not cited in *Enskat,* the court suggests that only "actual sex acts" can be found obscene.

A pre-*Miller* case which is at war with both the Attorney General's and the District Attorney's understanding of the statute is *People v. Andrews,* 23 Cal.App. 3d Sup. 1, 100 Cal.Rptr. 276 (1972). *Andrews* held that *Zeitlin* does not impose "any judicially created modification or limitation upon the tests of obscene material prescribed by *Roth* and Penal Code §311.2 by its references to 'hard core' pornography. . . ." 23 Cal.App.3d Sup. at 5, 100 Cal.Rptr. at 278. In *Andrews*, the court rejected the view that the test of whether photographs are obscene "is a mechanical one which is satisfied only when they explicitly show actual penetration or contact between the erogenous organs or

zones of the actors". The court recognized that its interpretation of the statute was "less specific and mechanical" than the interpretation urged upon it. 23 Cal. App.3d Sup. at 6, 100 Cal.Rptr. at 278.

The California statute, as written and as construed, is also ambiguous with regard to the different tests to be applied to textual works as opposed to pictorial works. Burt Pines, the City Attorney for the City of Los Angeles, concluded after *Miller* was decided, that *Kaplan v. California,* 413 U.S.115, notwithstanding, it was his view that the California obscenity statute could not reach publications which are entirely textual. Speaking before the 38th Annual Conference of the National Institute of Municipal Law Officers (October 21-24, 1973), City Attorney Pines stated:

> "I strongly believe that the communication of ideas entirely by the printed word . . . have some redeeming social value." (The Hollywood Reporter, 43rd Anniversary Edition, p. 79.)[17]

In an article appearing in the California State Bar Journal, entitled "The Obscenity Quagmire", Mr. Pines notes that the district attorneys of Sacramento County and San Francisco County have forgone further obscenity prosecutions. (46 Cal. St. Bar J. 509, 562 (1974).)

The upshot of all the confusion demonstrates, it is respectfully submitted, that the District Court was correct in concluding that the California statute, as writ-

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[17]Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. at 100, observed that:

> "If the application of the 'physical conduct' test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse."

ten and construed, is not confined to regulating works which depict or describe specifically defined sexual conduct.

E. The District Attorney argues that in *Hamling v. United States,* 418 U.S.87, this Court "made clear that a construction similar to the construction in *Enskat* is constitutionally proper." (Br., p. 76.) In rejecting this argument when it was made to it, the District Court observed that this Court had construed the federal obscenity statute to include the specific sexual conduct described in *Miller*. *Enskat* did not construe the California statute as encompassing the specific conduct mentioned in *Miller*. The court stated that the dispositive answer to the District Attorney's argument is that "there is nothing in Hamling which would lead this Court to believe that the specificity requirements of *Miller* have been overruled. The tenets of *Miller* have not been met, either by the California statute on its face or as construed, either pre-*Miller* or in *Enskat*. There has been no construction by the California courts of an obscenity standard based upon specific acts, nor any formulation comparable to that added to the federal statute in *Hamling*." (A. 124.)

If, as the court below stated, and as Appellees believe, the *Miller* specificity requirement has not been overruled, the ruling of the District Court finding the California obscenity statute unconstitutional should be affirmed.

Conclusion.

For all the foregoing reasons, the appeal should be dismissed as not being within the jurisdiction of this Court. In the alternative, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

Additional Statute Involved.

California Penal Code.

§ 1538.5 [Motion for return of property or suppression as evidence: Special hearings: New complaint or indictment: Appeals: Review by mandate or prohibition: Stay of proceedings: Dismissal of action: Release of defendant: Bail: Motions based on freedom of speech or press.] (a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a

misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek

an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j) the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(1) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) The proceedings provided for in this section. Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant

to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant. [1967 ch 1537 § 1; 1970 chs 1289 § 2, 1441 § 1.5.]

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Vincent Miranda, et al., Plaintiffs, vs. Cecil Hicks, etc., et al., Defendants. No. 73-2775-F.

Filed: 9/4/74.

Plaintiffs' Motion for Preliminary Injunction having come on for hearing in the above-entitled Court, the Honorable WARREN J. FERGUSON, presiding; the Court having considered said Motion and all of the pleadings in support of and in opposition to said Motion; the same having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

On November 23, 1973 and November 24, 1973, officers of the Buena Park Police Department, pursuant to Search Warrants, seized four prints of the film "Deep Throat" from the Pussycat Theatre in Buena Park, California (hereinafter referred to as "the Theatre").

II

On January 29, 1974, hearing was held before the Honorable MAX V. ELIASON, Judge of the Municipal Court of the North Orange County Judicial District, State of California, the case of *People v. Bailey*, Case No. NM 73 06675, at which the District Attorney of Orange County and counsel for the defendants in that case and for Plaintiffs in this case appeared. The

District Attorney for Orange County stipulated with counsel that each of the four prints of "Deep Throat" seized on November 23, 1973, and November 24, 1973, were identical and that for purposes of the pending criminal case only one print of the film "Deep Throat" was necessary for the prosecution.

III

By Order entered June 4, 1974, this Court, in the instant case, ruled that the multiple seizures of the film "Deep Throat" which took place on November 23, 1973 and November 24, 1973, clearly demonstrated Defendants' bad faith and harassment, in furtherance of a course of action that, regardless of the nature of any judicial proceedings, would effectively eliminate the film "Deep Throat" from Buena Park, California.

IV

On July 28, 1974, two members of the Buena Park Police Department viewed the films "Deep Throat" and "Devil in Miss Jones" at the Theatre.

V

On July 29, 1974, one of the officers executed an Affidavit in Support of Search Warrant requesting a Search Warrant for the film "Devil in Miss Jones." On July 29, 1974, a Search Warrant was issued for the seizure of the film "Devil in Miss Jones." At approximately 5:25 P.M. on July 29, 1974, one print of the film "Devil in Miss Jones" was seized from the Theatre.

VI

On July 29, 1974, an Affidavit in Support of Search Warrant was executed by one of the officers requesting a Search Warrant for the film "Deep Throat." On July

29, 1974, a Search Warrant was issued for the seizure of the film "Deep Throat." At approximately 5:25 P.M. on July 29, 1974, one print of the film "Deep Throat" was seized from the Theatre.

VII

At approximately 2:30 P.M. on July 30, 1974, officers of the Buena Park Police Department seized a second print of the film "Deep Throat" from the Theatre without a Search Warrant but on the basis of a document styled "Order of Seizure After Adversary Hearing," signed by a judge of the Superior Court on November 28, 1973, in the case of *People v. Miranda, et al.*, No. M 2248.

VIII

At approximately 12:53 A.M. on July 31, 1974, officers of the Buena Park Police Department seized a third print of the film "Deep Throat" from the Theatre on the basis of the Search Warrant previously issued on July 29, 1974.

IX

On July 31, 1974, an officer of the Buena Park Police Department executed an Affidavit in Support of Search Warrant requesting another Search Warrant for the film "Devil in Miss Jones." On July 31, 1974, a Search Warrant was issued for the seizure of the film "Devil in Miss Jones." At approximately 12:55 P.M. on July 31, 1974, a second print of the film "Devil in Miss Jones" was seized from the Theatre.

X

On July 31, 1974, at an *ex parte* hearing, a judge of the Superior Court modified the document styled "Order of Seizure After Adversary Hearing," by add-

ing the words "the court hereby reaffirms and reissues this order on 31 July 74."

XI

At approximately 4:35 P.M. on July 31, 1974, officers of the Buena Park Police Department seized a fourth print of the film "Deep Throat" from the Theatre without a Search Warrant but on the basis of the reissued "Order of Seizure After Adversary Hearing" dated July 31, 1974.

XII

At approximately 3:35 P.M. on August 1, 1974, officers of the Buena Park Police Department seized a fifth print of the film "Deep Throat" from the Theatre without a Search Warrant but on the basis of the reissued "Order of Seizure After Adversary Hearing" dated July 31, 1974.

XIII

On August 2, 1974, the judge of the Superior Court again signed the document styled "Order for Seizure After Adversary Hearing," dating his signature "2 August 74." At approximately 5:10 P.M. on August 2, 1974, without a Search Warrant but on the basis of said document, officers of the Buena Park Police Department seized a sixth print of the film "Deep Throat" from the Theatre. At 8:00 P.M. on August 2, 1974, without a Search Warrant but on the basis of the same document, officers of the Buena Park Police Department seized a seventh print of the film "Deep Throat" from the Theatre.

XIV

On August 2, 1974, a document styled "Order of Seizure After Adversary Hearing" was signed by the judge of the Superior Court in connection with the

film "Devil in Miss Jones." At approximately 5:10 P.M. on August 2, 1974, without a Search Warrant but on the basis of said document, a third print of the film "Devil in Miss Jones" was seized from the Theatre. At approximately 8:00 P.M. on August 2, 1974, without a Search Warrant but on the basis of the same document, a fourth print of the film "Devil in Miss Jones" was seized from the Theatre.

XV

Any findings of fact contained in the Conclusions of Law are deemed incorporated herein.

CONCLUSIONS OF LAW

I

The only lawful and legitimate law enforcement purpose in seizing prints of films is to preserve one print for evidence in the trial of any criminal prosecutions arising out of the exhibition of said films. There is no lawful and legitimate governmental purpose in seizing more prints than are necessary for such criminal prosecutions. Motion picture films are presumed to be constitutionally protected until they are finally declared obscene after trial by jury. Prior to such final determinations of obscenity in a criminal prosecution, motion picture films are not contraband, and are not subject to seizure on sight. *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789 (1973), *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796 (1973), *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 (1973), *Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723 (1964), and *Marcus v. Search Warrants of Property,* 367 U.S. 717, 81 S.Ct. 1708.

II

Where, as here, one print of a film is seized as evidence of an alleged violation of a state criminal obscenity law, it is a violation of the First and Fourteenth Amendments to the United States Constitution to attempt to suppress the continued exhibition of said film prior to the trial of said criminal charges by repeatedly seizing multiple prints of the same film. The pattern of seizures of multiple prints of the film "Deep Throat" and the film "Devil in Miss Jones" demonstrates Defendants' bad faith and harassment justifying federal intervention and injunction, since Defendants were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively suppress the exhibition of the film "Deep Throat" and the film "Devil in Miss Jones" from Buena Park, California.

III

A Preliminary Injunction should issue pending further order of this Court, enjoining and restraining Defendants, their agents and employees and all persons in active concert and participation with them, from seizing any further copies of the film "Deep Throat" or the film "Devil in Miss Jones" from the Theatre.

IV

Any conclusions of law contained in the Findings of Fact are deemed incorporated herein.

DATED: ....., 1974.

/s/ WARREN J. FERGUSON
United States District Judge